Delaware Consumer Bankruptcy CLE Program

January 26, 2021

Best Practices in Time of COVID-19

1. Remote representation and practice: confidentiality; cybersecurity; secure documents; preserving client's confidential information

2. Diligence and promptness in representation

3. Duty to communicate, keeping clients informed

4. Professionalism: accede to reasonable requests of opposing counsel that do not prejudice the rights of a client

5. Duty of reasonable inquiry: review readily accessible records such as relevant court records, tax returns, transcripts, title and lien searches.

6. Competence and supervision of staff who are working remotely

7. Certification of accuracy of information

8. What happens when a lawyer has health concerns regarding appearing in court or personally meeting with clients or witnesses? What happens when a debtor may not appear in court due to health concerns? Unable to appear for a deposition?

9. Email and text: May they be used for client communication and authorization for certification by clients?

10. What happens if unable to obtain or access important documents?

Best Practices in Time of COVID-19

11. Nature of Proceedings: In person or video

Case: In Re: Oliver Lawrence Bankr E.D.VA. (2020)

Motion to continue trial date-Denied. A 2nd Pre-trial conference was scheduled and held telephonically in accordance with the Court's COVID protocol. Counsel for the Trustee appeared by telephone but the Defendants did not appear, In the absence of an objection the Court scheduled trial for July 14, 2020 by video conference. The Defendants subsequently filed a Motion asking the Court to continue the Trial Date so they may conduct" in person testimony." They assert the trial by video conference will limit their ability to effectively confront and cross examine witnesses. In denying the Motion the Court held that the COVID Protocols of the Court provides all evidentiary hearings to be conducted by Zoom for Government. Further in response to the Defendants alleged due process right to in-person witness testimony, Rule 43(a) of the Fed R of Civ Proc as made applicable by BR 9017 allows, for good cause, to conduct the bench trial by video conference.

12. Failure to Act or Appear Due to Health

Case: In re: McMillin Bankr CD CA (2020)

An Order to Show Cause requiring the Defendant to appear and show cause why Defendant's Answer should not be stricken and why a default judgment should not be entered in favor of the Plaintiff. In this instance the Court held too extreme a remedy and discharged the Order to Show, and restored to the trial calendar. The facts were that 1) the defendant failed to cooperate in the preparation of a proposed joint pretrial stipulation; 2) the defendant failed to respond to attempts to meet and confer and 3) defendant failed to provide plaintiffs with exhibits and a witness list. In response counsel for the defendant explained his failure was due to caring for his wife with COVID in the month of July 2020 and that he contracted COVID and did not work until September 3, 2020. The Court reviewed requirements to impose case dispositive sanctions and whether non compliance involved willfulness, fault, or bad faith. The court noted:

-The public intertest in expeditious resolution of litigation

-The court's need to manage its docket

-the risk of prejudice to the other party

-the public policy favoring disposition on the merits

-the availability of less drastic sanctions.

Here the court did not find willfulness, fault, or bad faith. Although counsel for defendant should have arranged for another attorney to substitute, failure to do so does not warrant dispositive sanctions.

13. Assertion that Court Order Threatens Debtor's Health

Case: In Re: Greenfield Bankr D. Idaho (2020)

This summary focuses solely on the issue the Court addressed regarding the pro se Debtor's COVID-19 concerns. The debtor disagreed with the Court's decision authorizing the Trustee to employ a Realtor and allow prospective purchasers in her home. The debtor believed this will place her at risk as she is a senior with health issues and susceptible to COVID-19. The Court found that its rulings were not inconsistent with the Court's own COVID-19 Guidelines and the Idaho Governor's Guidelines. The Trustee, the Realtor, and the debtor should work together to develop procedures to allow prospective purchasers to view the property while adhering to proper safety protocols.

14. Rule 60 Relief based upon COVID-19

Case: In re: Maddox Bankr D. Kan (2020)

Debtor's Motion to Vacate Order Authorizing Trustee to Sell Incorrectly Surveyed Property. Previously in this case, an Order had been entered following mediation where the Trustee and the debtor settled a dispute regarding a claimed exemption of real property and the amount of that property the Trustee would be authorized to sell. After the mediation agreement, the Trustee obtained a survey that was incorrect and exceeded the parties' agreement. However, the counsel for the debtor did not contact the Trustee until several months later. The reason for the delay was that the timing of the filing and approvals of Supplemental Orders that included the incorrect survey occurred right as COVID_19 restrictions began and counsel did not travel to the property until the summer of 2020 and discovered the mistake. The court held that Rule 60(b)(1) applied and the debtor carried his burden to prove he his entitled to relief to correct the mistake.

Best Practices in Time of COVID-19

15. Diligence and Promptness in Representation

Case: In re: Somogye N.D. Ohio (2020)

In a dischargeability adversary proceeding the Plaintiffs file a Motion to Extend Time to file a Notice of Appeal. The Plaintiffs claimed they had missed the deadline due to COVID-19. First, they explained, one of their attorneys is at high risk, and the other attorney primarily practices in state court and Federal District Court where all of his cases were put on hold for a stay at home order. He therefore assumed the same applied to Bankruptcy Court. When Plaintiffs discovered the deadline to file an Appeal had passed, the Motion to Extend was filed. The court extensively reviewed the standards for a finding of neglect and excusable neglect, and found that neither applied here. The Motion was denied:

"The reason the plaintiffs missed the 14-day deadlines is the two lawyer's wrong legal conclusion that the deadlines in BR 8002(a)(1)(A) had been tolled because of COVID-19 pandemic for some indefinite period of time until the courts reopened and resumed normal business. The Court acknowledges the descriptive background of the personal stress of COVID-19 on both lawyers and the closure of their law offices, but finds the situation common to other local practitioners who continue to file documents and meet deadlines."

Be an Inquiring Mind Cases

In re Gardner, C/A No. 11-03192 (Bankr. D.S.C. Feb. 27, 2020) – In this chapter 7 case, the debtor filed a motion to reopen her case to disclose a Rolex watch (which she owned prepetition) with an approximate value of $9,000 and to claim an exemption after the watch was stolen from a safe in her home. After the watch was stolen debtor filed an insurance claim, but her insurance company denied the claim based on judicial estoppel because the watch was omitted from her bankruptcy schedules filed in 2011. The court reopened the case and found the appointment of a trustee was necessary to investigate recovery of the watch, insurance proceeds, and other assets, and to determine if any other actions were necessary based on debtor's failure to disclose.

In re Lively, C/A No. 07-00886 (Bankr. D.S.C. May 15, 2007) – The court granted the chapter 13 trustee's motion to dismiss with prejudice for the debtor's failure to disclose tractors, trailers, and welding equipment worth $15,145, after the trustee discovered the assets on debtor's tax returns and divorce decree.

In re Cooley, C/A No. 07-00977 (Bankr. D.S.C. Jun. 6, 2007) – The court granted the chapter 13 trustee's motion to dismiss with prejudice for the debtor's failure to disclose porta-johns and vehicles after the assets were brought to the trustee's attention when the debtor's ex-wife questioned him at the meeting of creditors.

In re Pearson, C/A 10-5166, 2010 WL 5169081 (Bankr. D.S.C. Oct 18, 2010) – The court denied confirmation of the debtor's chapter 13 plan after it was discovered he failed to schedule ownership of certain real property. The property was discovered after a creditor's secured proof of claim listed the property as collateral. The debtor asserted he "forgot" to list the property due to marital problems and emotional stress, but the court was unconvinced by that argument.

In re Lafferty, 469 B.R. 235 (Bankr. D.S.C. 2012) – The court sustained an objection to the chapter 7 debtors' exemptions and overruled the debtors' motions to avoid judicial liens when inconsistent testimony from ex-spouse debtors and their paramours, and documentary evidence cast doubt on whether the debtors resided at the real property in which they claimed homestead exemptions.

In re Simpson, 306 B.R. 793 (Bankr. D.S.C. 2003) – The chapter 13 debtors' case was dismissed with prejudice for 18 months and the debtors were ordered to pay attorney's fees because they concealed out-of-state real estate and an automobile, undervalued their residence, submitted inaccurate schedules and statements, and testified falsely at their meeting of creditors. The falsehoods came to light after 3 creditors objected to confirmation of the plan alleging debtors failed to disclose significant assets.

In re Pustejovsky, 577 B.R. 671 (Bankr. W.D. Tex. 2017) – After a lengthy delay by debtor in filing accurate schedules and a confirmable plan, the court granted debtor's motion to dismiss her chapter 13 case unaware that she had recently agreed to accept a $780,000 settlement in an undisclosed wrongful death lawsuit. The chapter 13 trustee and several creditors requested the

case be reinstated, and debtor's testimony at the reinstatement hearing disclosed the settlement. In granting the motion to reinstate the case and converting it to chapter 7, the court found the "bad faith exception" limited the debtor's absolute right to dismiss her chapter 13 bankruptcy case as she failed to disclose the wrongful death claim, failed to provide financial statements to the trustee, and failed to provide notice of the bankruptcy case filing to certain creditors.

In re Feldman, 597 B.R. 448 (Bankr. E.D.N.Y. 2019) - The court dismissed the debtor-attorney's chapter 13 case for bad faith based on numerous inaccuracies in his schedules and statements, his failure to disclose his income and his spouse's income, and his filing of a fraudulent proof of claim on behalf of his sister, all of which was evidenced by his financial records (which he delayed turning over to the trustee) and his testimony at the trial on the motion to dismiss.

Murphy Oil USA, Inc v. Lymon (In re Lymon), C/A No. 18-13128, Adv. Pro. No. 19-1121 (Bankr. E.D. La. 2019) – In this chapter 13 case, the court granted a company's motion for declaratory relief prohibiting the debtor from pursuing a state court personal injury action against it pursuant to the doctrine of judicial estoppel after the debtor failed to disclose the personal injury lawsuit on her schedules.

In re Gardner, 384 B.R. 654 (Bankr. S.D.N.Y. 2008) – During the administration of the estate, the chapter 7 trustee discovered debtor failed to disclose bank accounts, timeshares, his interests in four businesses, and failed to provide the trustee with adequate books and records. As a result, debtor's discharge was denied pursuant to § 727.

In re Beatty, 583 B.R. 128 (Bankr. N.D. Ohio 2018) – The chapter 7 debtor's discharge was denied under § 727 when, through his testimony at his §341 hearing and a subsequent 2004 exam, it was discovered he failed to disclose a sportscar and electronics, such as a gaming console, smart-phone, tablet, televisions, and laptop computer. The debtor also failed to disclose all his business interests, transfers of real estate, and failed to account for the loss of $264,130.00 in liquid assets.

Always Do Your Due Diligence

In re Parikh, 508 B.R. 572 (Bankr. E.D.N.Y. 2014) - The court granted a creditor's motion for sanctions against the debtor's counsel and his law firm pursuant to Fed. R. Bankr. P. 9011 for the attorney's failure to conduct an "inquiry reasonable under the circumstances" when he filed a chapter 7 bankruptcy petition that contained incomplete and incorrect information, which would have been apparent to the debtor's attorney if he had reviewed documents filed in debtor's recently dismissed chapter 13 case.

In re Withrow, 391 B.R. 217 (Bankr. D. Mass. 2008), *aff'd*, 405 B.R. 505 (B.A.P. 1st Cir. 2009) – The court sanctioned the debtor's attorney for his failure to comply with Fed. R. Bankr. P. 9011 and § 707(b)(4)(C) and (D) because he failed to: (1) properly review information provided by the debtor with respect to his prepetition income; (2) identify contradictions and inconsistencies in the schedules, statement of financial affairs, and other documents filed on behalf of the debtor; (3) promptly correct those contradictions and inconsistencies, even when identified by the chapter 7

trustee; and (4) place himself in a position of being able to explain the reasons for those contradictions and inconsistencies to the court even in the context of an evidentiary hearing of which he had more than adequate notice.

But How Much Due Diligence?

In re Taylor, 655 F.3d 274 (3d Cir. 2011) – "The concern of Rule 9011 is not the truth or falsity of the representation in itself, but rather whether the party making the representation reasonably believed it at the time to have evidentiary support. In determining whether a party has violated Rule 9011, the court need not find that a party who makes a false representation to the court acted in bad faith. The imposition of Rule 11 sanctions . . . requires only a showing of objectively unreasonable conduct." (citations omitted).

In re Kayne, 453 B.R. 372 (B.A.P. 9th Cir. 2011) – "Rule 9011, now enhanced by the BAPCPA additions to the Code, evinces a policy that a debtor's attorney exercise independent diligence and care in ensuring that there is evidentiary support for the information contained in his client's bankruptcy schedules." (citations omitted).

In re Beinhauer, 570 B.R. 128 (Bankr. E.D.N.Y. 2017) – "The duty of reasonable inquiry imposed upon an attorney by Rule 9011 requires the attorney (1) to explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) to ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor; (3) to check debtor's responses in the petition and schedules to assure they are internally and externally consistent; (4) to demand of debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) to seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor." (citations omitted).

Relevant Authorities

11 U.S.C. § 707(b)(4)

> **(C)** The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—
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> > **(i)** performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
> >
> > **(ii)**determined that the petition, pleading, or written motion—
> >
> > > **(I)** is well grounded in fact; and
> > >
> > > **(II)** is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).
>
> **(D)** The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

Fed. R. Bankr. P. 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

> (a) SIGNATURE. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
>
> (b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so

identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

(e) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. §1746 satisfies the requirement of verification.

(f) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Fed. R. Bankr. P. 1008. Verification of Petitions and Accompanying Papers.

All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.

Attorneys must certify the following when signing the Voluntary Petition:

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

Don't Forget the Ethics Rules

Rule 1.1 of the Model Rules of Professional Conduct: Competence – A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Model Rules of Prof'l Conduct R. 1.1 (2019).

Lawyers should ensure the volume of their cases does not exceed their capabilities to effectively manage each case. An attorney's duty of due diligence doesn't end when they get busy.

Rule 5.3(b) of the Model Rules of Professional Conduct: Responsibilities Regarding Nonlawyer Assistance - (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Model Rules of Prof'l Conduct R. 5.3 (2019).

Lawyers have to ensure their staff are also acting in a way that complies with the lawyer's duties.

At Least Avoid Punishments

18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery

A person who—

the purpose of executing or concealing such a scheme or artifice or attempting to do so—

(1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title;

(2) files a document in a proceeding under title 11; or

(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.

IN RE: OLIVER LAWRENCE, Chapter 7, Debtor.
IN RE: CHAMBERLAYNE AUTO SALES & REPAIR, INC., Chapter 7, Debtor.
PETER J. BARRETT, TRUSTEE, Plaintiff,
v.
NANCY ANN ROGERS, SUBSTITUTE TRUSTEE, et al., Defendants.

Case Nos. 17-30339-KRH, 17-30335-KLP, Adv. Pro. No. 19-03082-KRH.

United States Bankruptcy Court, E.D. Virginia, Richmond Division.

July 8, 2020.

MEMORANDUM OPINION

KEVIN R. HUENNEKENS, Bankruptcy Judge.

This matter comes before the Court on the *Defendants' Objection to the Second Pretrial Order (Doc 48), Motion for Trial by Jury and Motion to Continue Trial Date* [ECF No. 50] (the "Motion") filed by Nancy Ann Rogers and Nancy Ann Rogers, P.C. (collectively, the "Defendants"). On July 8, 2020, as scheduled by the Defendants and only six days prior to the trial date, the Court conducted a hearing on the Motion (the "July 8 Hearing"). For the reasons stated herein, the Motion will be denied. This Memorandum Opinion sets forth the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.[1]

The Court has subject-matter jurisdiction over the above-captioned adversary proceeding (the "Adversary Proceeding") pursuant to 28 U.S.C. §§ 157 and 1334 and the General Order of Reference from the United States District Court for the Eastern District of Virginia dated August 15, 1984 (the "Standing Order of Reference"). This is a core proceeding under 28 U.S.C. § 157(b)(A), (G), (H), and (O). Venue is appropriate pursuant to 28 U.S.C. § 1409.

Peter J. Barrett (the "Trustee"), Chapter 7 Trustee for (i) the bankruptcy estate of Chamberlayne Auto Sales & Repair, Inc.; and (ii) the bankruptcy estate of Oliver Lawrence filed a three-count complaint [ECF No. 1] (the "Complaint") against the Defendants (together with the Trustee, the "Parties") on September 16, 2019, thereby commencing this Adversary Proceeding. On December 3, 2019, the Court entered its *Pretrial Order* [ECF No. 7] (the "Original Pretrial Order"), which provided in pertinent part:

> Any party not consenting to the entry of a final order by the Bankruptcy Judge shall file a Motion to withdraw the reference or for other appropriate relief within 30 days of the entry of this Pretrial Order and shall promptly set the matter for a hearing. The failure to comply with the terms of this paragraph shall be deemed to constitute consent to the entry of final orders by the Bankruptcy Judge.

Original Pretrial Order ¶ 13, ECF No. 7.[2] Accordingly, the deadline to file a motion to withdraw the reference or similar relief was January 2, 2020. No such motion was filed on or before the January 2, 2020, deadline.

By Order entered May 14, 2020 [ECF No. 36] (the "May 14 Order"), the Court granted the Trustee's *Motion for Partial Summary Judgment* [ECF No. 13] as to liability for counts I and II of the Complaint against both Defendants.[3] The Defendants are seeking leave to appeal the interlocutory May 14 Order to the District Court. Defs.' Mot. Leave Appeal, ECF No. 40.[4]

The Court held a further pretrial conference on June 10, 2020 (the "Second Pretrial Conference"). In accordance with the Court's *Protocol in Response to Public Health Emergency* (the "Protocol"), as made applicable to this Adversary Proceeding by Richmond General Order 20-5, the Second Pretrial Conference was conducted telephonically. Counsel for the Trustee appeared telephonically at the Second Pretrial Conference, but counsel for the Defendants did not appear at the Second Pretrial Conference.[5] At the Second Pretrial Conference and in the absence of any objection, the Court scheduled the trial (the "Trial") in this Adversary Proceeding for July 14, 2020 (the "Trial Date"). After conducting the Second Pretrial

Conference, the Court entered its *Second Pretrial Order* [ECF No. 50] (the "Second Pretrial Order"). The Second Pretrial Order set the Trial Date and provided that the one-day Trial would be conducted via video conference in accordance with Richmond General Order 20-5. The Second Pretrial Order further provided that "[e]xcept as modified [by the Second Pretrial Order] or by General Order 20-5, all other terms and provisions set forth in the Original Pretrial Order shall remain in full force and effect." Second Pretrial Order ¶ 3, ECF No. 48.[6]

Despite failing to appear at the Second Pretrial Conference and, therefore, failing to timely object to the Trial Date, the Defendants' Motion raises objections to the Second Pretrial Order, demands a trial by jury, and asks the Court to continue the Trial Date to such date in the future as would allow in-person witness testimony. As more fully explained herein, the Court finds that the Defendants have waived any right to a jury trial by their conduct and further finds that good cause in compelling circumstances exist to permit video transmission of witness testimony.

Rule 38 of the Federal Rules of Civil Procedure, as made applicable to this Adversary Proceeding by Rule 9015(a) of the Federal Rules of Bankruptcy Procedure, provides that "a party may demand a jury trial by (1) serving the other parties with a written demand—which may be included in a pleading . . . ." Fed. R. Civ. P. 38(b)(1); Fed. R. Bankr. P. 9015(a). By their answer, the Defendants demanded a jury trial. Answer ¶ 68, ECF No. 5.

However, that is not the end of the inquiry as to whether the Defendants are entitled to a jury trial at this late stage. In the Fourth Circuit, even where a jury demand is properly made, the right to a jury trial may be waived by the party's conduct. *United States v. 1966 Beechcraft Aircraft,* 777 F.2d 947, 951 (4th Cir. 1985); *cf. Liner v. Jones,* 881 F.2d 1069, 1069 n.* (4th Cir. 1989) (per curiam) ("Although Liner requested `relief by Grand Jury' in his complaint, he subsequently waived any right to trial by jury by not objecting to the pre-trial order captioned `NON-JURY.'").

> If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

28 U.S.C. § 157(e). By the Standing Order of Reference, the United States District Court for the Eastern District of Virginia (the "District Court") automatically refers all bankruptcy matters to this Court. The Standing Order of Reference is silent as to whether this Court could conduct a jury trial, and the District Court has not specifically authorized this Court to conduct a jury trial in this Adversary Proceeding. Therefore, this Court does not have the authority to conduct a jury trial in this Adversary Proceeding.[7] *See* Hudgins v. Shah (In re Sys. Eng'g & Energy Mgmt. Assocs., Inc.), 252 B.R. 635, 644 n.6 (Bankr. E.D. Va. 2000) ("The Defendants . . . have requested a jury trial for this adversary proceeding, which this Court is not authorized to conduct. . . . [T]he district court must conduct any trial on the merits as to these Defendants, to the extent a right to jury trial exists for each count." (internal citation omitted)).

Assuming without deciding that the right to a jury trial applies to this Adversary Proceeding, because this Court has not been designated to conduct jury trials, in order to obtain a jury trial, the Defendants should have filed a motion to withdraw the reference. But, the time for doing so has long expired. As stated above, the Original Pretrial Order required the Parties to file a motion to withdraw the reference or seek other appropriate relief within thirty days of its entry, i.e., no later than January 2, 2020. Original Pretrial Order ¶ 13, ECF No. 7. The Defendants failed to do so.[8] As such, by the terms of the Original Pretrial Order, the Defendants are "deemed to . . . consent to the entry of final orders by the Bankruptcy Judge." *Id.* Accordingly, by the Defendants' conduct, the Court finds that the Defendants have waived any right to a jury trial and have consented to a bench trial before this Court. *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, ____, 135 S. Ct. 1932, 1947-48 (2015);[9] *Hackman v. Wilson (In re Hackman),* 534 B.R. 867, 870 (Bankr. E.D. Va. 2015) ("The Plaintiffs, having initiated the action and having litigated the case for more than eight months in this Court without raising an objection to the Court's ability to enter final orders, have consented to the entry of final orders by the undersigned bankruptcy judge.").

By their Motion, the Defendants also ask the Court to continue the Trial Date so that they may conduct "in person testimony." Mot. 5, ECF No. 50. The Defendants assert that conducting the trial by video conference will "limit the defendants' ability to effectively confront and cross examine witnesses in a case that involves multiple factual disputes." Mot. 4, ECF No. 50.

The Defendants acknowledge that "the COVID-19 pandemic certainly requires social distancing and other precautions to limit the spread of infection." *Id.* In light of the current public health emergency, pursuant to Standing Order 20-21, "all Bankruptcy Court proceedings shall be convened remotely . . . ." As applicable to this Adversary Proceeding, this Court's

Protocol provides that "[a]ll evidentiary hearings must be conducted by video conference using Zoom for Government." Accordingly, the Trial in this Adversary Proceeding must be conducted by video conference, as detailed in the Second Pretrial Order.

In response to the Defendants' alleged due process right to in-person witness testimony,[10] Rule 43(a) of the Federal Rules of Civil Procedure, as made applicable to bankruptcy proceedings by Rule 9017 of the Federal Rules of Bankruptcy Procedure, provides in pertinent part:

> At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Fed. R. Civ. P. 43(a); Fed. R. Bankr. P. 9017. "Good cause in compelling circumstances" exist in light of the current global pandemic. *Argonaut Ins. Co. v. Manetta Enters., Inc.*, No. 19-CV-00482 (PKC) (RLM), 2020 WL 3104033, at *1, 2020 U.S. Dist. LEXIS 103625, at *2-5 (E.D.N.Y. June 11, 2020) ("The Court finds that the COVID-19 pandemic, and the months' long delay it has caused—indeed, continues to cause—in all court proceedings, constitutes `good cause and compelling circumstances' to hold the bench trial in this matter via video-conference."); *ResCap Liquidation Tr. v. Primary Residential Mortg., Inc.* (*In re RFC & ResCap Liquidating Tr. Action*), No. 0:13-cv-3451 (SRN/HB), 2020 WL 1280931, at *3, 2020 U.S. Dist. LEXIS 44607, at *17 (D. Minn. Mar. 13, 2020); *cf. In re Broiler Chicken Antitrust Litig.*, No. 1:16-CV-08637, 2020 WL 3469166, at *8, 2020 U.S. Dist. LEXIS 111420, at *95-96 (N.D. Ill. June 25, 2020) (rejecting defendants' objection to video depositions and request for delay as "neither practical nor, in the Court's judgment, wise" because, inter alia, any "`hope the physical distancing and stay-at-home orders required by the current pandemic will be lessened to allow for in-person depositions in the near future' [is] `pure speculation.'" (quoting *United States ex rel. Chen v. K.O.O. Constr., Inc.*, No. 19cv1535-JAH-LL, 2020 WL 2631444, at *1, 2020 U.S. Dist. LEXIS 81866, at *3 (S.D. Cal. May 8, 2020))). The Court further finds that the *Instructions for Remote Witness Testimony Using Zoom for Government,* attached as Exhibit B to the Protocol and made applicable to this Adversary Proceeding by paragraph 5(b) of the Protocol, constitute appropriate safeguards within the meaning of Rule 43(a) of the Federal Rules of Civil Procedure. Therefore, the Court shall exercise its discretion under Rule 43(a) of the Federal Rules of Civil Procedure, as made applicable hereto by Rule 9017 of the Federal Rules of Bankruptcy Procedure, to conduct the bench trial in this Adversary Proceeding via video conference.

Accordingly, the Motion is DENIED. A separate Order will issue.

[1] Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See* Fed. R. Bankr. P. 7052.

[2] The Court entered the Original Pretrial Order after conducting an initial pretrial conference on November 26, 2019, as scheduled by the summons served with the Complaint. Counsel for all Parties participated at the initial pretrial conference. The Parties selected dates for a two-day trial on May 4 and 5, 2020 (the Original Trial Date"), and they consented to the entry of the Court's customary pretrial scheduling order. Among other things, the Original Pretrial Order established a discovery cutoff date of April 13, 2020, and set a deadline for filing dispositive motions. Original Pretrial Order ¶¶ 4, 5, ECF No. 7. The Trustee timely filed a *Motion for Partial Summary Judgment* [ECF No. 13] on March 30, 2020, and subsequently moved for a brief adjournment of the Original Trial Date in order to have an opportunity to argue his summary judgment motion. Mot. Adjournment Trial, ECF No. 24. Counsel for the Defendants consented to the requested continuance and the Court adjourned the Original Trial Date by Order entered April 29, 2020 [ECF No. 32].

[3] The May 14 Order further provided that that the Court would "hold a pre-trial conference (the "Pre-Trial Conference") on June 10, 2020, at 11:30 a.m. in Courtroom 5000, 701 E. Broad Street, Richmond, Virginia, 23219;" and "that the Court would set Count III of the Complaint for trial at the Pre-Trial Conference." Order 2, ECF No. 36 (emphasis in original).

[4] No motion for a stay of the interlocutory May 14 Order pending appeal has been filed in accordance with Rule 8007 of the Federal Rules of Bankruptcy Procedure.

[5] At the July 8 Hearing, counsel for the Defendants represented that he attempted to appear in person at the Second Pretrial Conference in contravention of the Protocol.

[6] At the time the Court adjourned the Original Trial Date, *see supra* note 2, trial preparation was substantially completed. All discovery had been concluded, all dispositive motions had been filed, any expert reports had been exchanged, and the Parties were otherwise ready to try the case.

[7] At the July 8 Hearing, the Defendants relied upon Judge Payne's decision in *Helmer v. Murray (In re Murray)*, 149 B.R. 383 (E.D. Va. 1993) for the proposition that this Court is authorized to conduct jury trials on core matters and the Defendants conceded that this Adversary Proceeding involved only core matters. However, *In re Murray* concerned a motion to withdraw the reference, in part, to permit

the district court to conduct a jury trial on non-core issues for which the defendants did not consent to entry of a final order by the bankruptcy court. *Id.* at 387. Judge Payne found this to be a factor in support of withdrawal of the reference. *Id.* at 388. *In re Murray* does not stand for the proposition that this Court may conduct a jury trial on core matters. Rather, Judge Payne stated:

All but one of the United States Courts of Appeals that have addressed the issue have held that bankruptcy courts cannot conduct jury trials. The United States Court of Appeals for the Second Circuit, in *Ben Cooper, Inc. v. Insurance Company of State of Pennsylvania*, 896 F.2d 1394, 1402 (2d Cir.1990), held that bankruptcy courts may conduct jury trials in core proceedings, but, with respect to non-core proceedings, the court observed that "the Seventh Amendment may well render unconstitutional jury trials in non-consensual non-core proceedings, because of the requirement that findings of fact by the bankruptcy court be reviewed de novo by the district court."

Id. at 387 (quoting *Ben Cooper, Inc. v. Ins. Co. of State of Pa. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1403 (2d Cir.), *vacated*, 498 U.S. 964 (1990), *and opinion reinstated*, 924 F.2d 36 (2d Cir. 1991)) (citing *In re Grabill Corp.*, 967 F.2d 1152 (7th Cir. 1992); *Rafoth v. Nat'l Union Fire Ins. Co. (In re Baker & Getty Fin. Servs., Inc.)*, 954 F.2d 1169 (6th Cir. 1992); *Beard v. Braunstein*, 914 F.2d 434 (3d Cir. 1990); *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380 (10th Cir. 1990); *In re United Mo. Bank of Kan. City, N.A.*, 901 F.2d 1449 (8th Cir. 1990); *Taxel v. Elec. Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444 (9th Cir. 1990)). Notably, the Second Circuit's decision in *Ben Cooper* concerned only whether the bankruptcy court could constitutionally conduct a jury trial prior to the enactment of 28 U.S.C. § 157(e) in 1994 and, as such, is inapposite to the case at bar. *See* 896 F.2d at 1401; Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified at 28 U.S.C. § 157(e)).

[8] An analogous situation presented itself in *Tavenner v. Sigler*, No. 3:17CV502, 2018 WL 1511733, 2018 U.S. Dist. LEXIS 51893 (E.D. Va. Mar. 27, 2018). In that case, the defendant had made two written jury demands but had failed to timely move to withdraw the reference or seek other relief from the bankruptcy court in accordance with the applicable pretrial scheduling order. *Id.* at *4, 2018 U.S. Dist. LEXIS 51893, at *11. As such, the bankruptcy court denied the defendant's jury demand, finding the defendant

did not timely move to withdraw the reference, nor did [he] seek other appropriate relief. [He] set nothing down for hearing after entry of the Pre-Trial Order. [He] took no affirmative action as is required by the Court's Pre-Trial Order. Thus, [he has] consented to the entry of final orders by [the Bankruptcy] Court. [He has] consented to [the Bankruptcy] Court hearing all matters.

Id. at *2, 2018 U.S. Dist. LEXIS 51893, at *5 (alterations in original). Rather than appealing the bankruptcy court's decision, the defendant then moved to withdraw the reference. Denying the defendant's untimely motion, the District Court held:

by litigating this case in the bankruptcy court for more than two months and only moving to withdraw the reference afterward, Sigler, at the very least, risked disrupting the certainty of the proceedings in the Bankruptcy Court. It defies reason that a party could move to withdraw the reference at any time in an adversary proceeding before the Bankruptcy Court, and justify a potentially late motion to do so by asserting that it had "endeavored to comply" with the Bankruptcy Court's orders. Litigants are tasked with knowing the laws and procedures of the courts in which they litigate. In order to ensure timely and efficient resolution of the matters before the courts, litigants must comply (not just endeavor to comply) with those rules. Failure to do so risks forfeiting relief to which the litigant might otherwise be entitled.

Id. at *4 n.13, 2018 U.S. Dist. LEXIS 51893, at *12 n.13.

[9] Although *Wellness International* primarily concerned consent to the bankruptcy court's jurisdiction under 28 U.S.C. § 157(c)(2) to hear and determine constitutionally non-core matters (which has not been raised here), the Supreme Court based its holding, in part, on *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), which concerned the defendant's alleged right to a jury trial:

On the constitutional question (the one relevant here) the Court began by holding that Schor had "waived any right he may have possessed to the full trial of [the broker's] counterclaim before an Article III court." The Court then explained why this waiver legitimated the CFTC's exercise of authority: "[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights"—such as the right to a jury . . . .

Wellness Int'l Network, 575 U.S. 665, 135 S. Ct. at 1942-43 (alteration in original) (quoting *Schor*, 478 U.S. at 848-49 (1986)).

[10] During the national emergency and continuing until the earlier of thirty days after the termination of the national emergency declaration or the date when the Judicial Conference of the United States finds that the federal courts are no longer materially affected, Congress has specifically authorized the federal judiciary to conduct various criminal proceedings by video conference and teleconference. Coronavirus Aid, Relief, & Economic Security (CARES) Act, Pub. Law No. 116-136, § 15002, 134 Stat 281 (2020). The Judicial Conference of the United States has authorized federal judges to use remote broadcasting in civil proceedings. *See Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. Courts (Mar. 31, 2020), https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic?utm_campaign=usc-news&utm_medium=email&utm_source=govdelivery.

In re: Ryan James McMillin, Debtor.
Elite Optoelectronics Co., Ltd a China Limited Liability Company and G-Sight Solutions, LLC, a California limited liability company, Plaintiffs,
v.
Ryan James McMillin, Defendant.

Case No. 2:19-bk-12402-ER, Adv. No. 2:19-ap-01137-ER.

United States Bankruptcy Court, C.D. California, Los Angeles Division.

September 10, 2020.

MEMORANDUM OF DECISION DISCHARGING ORDER REQUIRING DEFENDANT TO SHOW CAUSE WHY DEFENDANT'S ANSWER SHOULD NOT BE STRICKEN AND WHY DEFAULT JUDGMENT SHOULD NOT BE ENTERED IN FAVOR OF PLAINTIFF

[RELATES TO DOC. NO. 63]

ERNEST M. ROBLES, Bankruptcy Judge.

At the above-captioned date and time, the Court conducted a hearing on the *Order Requiring Defendant to Appear and Show Cause Why Defendant's Answer Should Not Be Stricken and Why Default Judgment Should Not Be Entered in Favor of Plaintiff* [Doc. No. 63] (the "0SC"). Although Defendant could have, and should have, exercised much greater diligence with respect to this litigation, the striking of Defendant's Answer and the entry of Defendant's default would be too extreme a remedy. Therefore, the Court will discharge the OSC and restore this action to the trial calendar.[1]

I. Facts and Summary of Pleadings

The Court issued the OSC based upon Defendant's failure to fulfill any of his obligations in connection with the Pretrial Conference. Specifically, Defendant (1) failed to cooperate with Plaintiffs in the preparation of a proposed Joint Pretrial Stipulation, even after Plaintiffs served a copy of the proposed Pretrial Stipulation upon Defendant by overnight courier, attempted to contact Defendant by telephone, and attempted to contact Defendant by e-mail; (2) failed to respond to Plaintiffs' attempts to meet and confer regarding the Pretrial Stipulation; and (3) failed to provide Plaintiffs with trial exhibits or a list of proposed witnesses.[2]

Defendant's counsel failed to file a written response to the OSC by August 19, 2020, as ordered by the Court. Instead, counsel filed a response on the day prior to the hearing. As an explanation for his non-compliance, counsel states that during the month of July 2020, he was required to care for his spouse, who had been diagnosed with COVED-19. Counsel states that he contracted COVID-19 in late July 2020, and did not return to work until September 3, 2020. Counsel requests the opportunity to proceed to trial on the merits.

II. Findings and Conclusions

To impose case dispositive sanctions, the Court is "required to consider whether the ... noncompliance involved willfulness, fault, or bad faith, and also to consider the availability of lesser sanctions." *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1247 (9th Cir. 2012) (internal citations omitted). When imposing case-dispositive sanctions, the Court must consider the following factors:

1) the public's interest in expeditious resolution of litigation;

2) the court's need to manage its docket;

3) the risk of prejudice to the party who has litigated diligently;

4) the public policy favoring the disposition of cases on their merits; and

5) the availability of less drastic sanctions.

Moneymaker v. CoBEN (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994); *see also Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1169 (9th Cir. 2012) (applying the *Eisen* factors to determine whether it was appropriate for a court to strike a pleading and enter default).

There are three sub-parts to the fifth factor, the availability of less drastic sanctions: "whether the court has considered lesser sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of case-dispositive sanctions." *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). The application of these factors is not mechanical; instead, the factors provide the Court "with away to think about what to do, not a set of conditions precedent for sanctions or a script that the [Court] must follow." *Id.*

Here, the most salient considerations are factors four (the public policy favoring the disposition of cases on their merits) and five (the availability of less drastic sanctions). With respect to factor four, "the public policy favoring disposition of cases on their merits strongly counsels against dismissal." *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006). With respect to factor five, the Court's warning to Defendant's counsel about the possibility of case-dispositive sanctions appears to have been sufficient to induce counsel to attend diligently to his obligations in connection with the litigation. Under the circumstances, the Court finds the sanction of striking Defendant's Answer and entering Defendant's default to be too extreme a remedy.

In addition, the delay occasioned by Defendant's dilatory conduct has not unduly prejudiced Plaintiffs (factor three). "Prejudice itself usually takes two forms—loss of evidence and loss of memory by a witness." *Nealey v. Transportacion Maritima Mexicana, S. A.*, 662 F.2d 1275, 1281 (9th Cir. 1980). There is no indication that the delay of approximately four months resulting from Defendant's lack of diligence has resulted in loss of evidence or loss of memory by a witness.

Finally, the Court cannot find that Defendant's delay involved the kind of "willfulness, fault, or bad faith" sufficient to support a case-dispositive sanction. *R & R Sails*, 673 F.3d at 1247. The hardships imposed by the COVID-19 pandemic are not an excuse to disregard litigation obligations. Once it became apparent that circumstances would not permit him to adequately attend to this action, Defendant's counsel should have arranged for another attorney to handle his responsibilities. Counsel's failure to do so cannot be condoned; however, such failure does not warrant a case-dispositive sanction. "A terminating sanction ... is very severe" and should not be imposed where other alternatives are available. *Connecticut Gen. Life Ins. Co.*, 482 F.3d at 1096.

For these reasons, the Court will discharge the OSC and restore this action to the trial calendar. Because Defendant has not yet provided Plaintiffs copies of any exhibits that he intends to introduce at trial, the Court will reopen discovery, but only as to Plaintiffs.[3] The deadline for Plaintiffs to complete discovery shall be October 30, 2020.[4] A Pretrial Conference is set for December 15, 2020 at 11:00 a.m. Trial is set for the week of January 25, 2021. The exact date(s) of trial will be set at the Pretrial Conference.

III. Conclusion

Based upon the foregoing, the OSC is DISCHARGED. The Court will prepare and enter an order consistent with this Memorandum of Decision.

[1] The Court reviewed the following papers in deciding this matter:

1) *Order ... Requiring Defendant to Appear and Show Cause Why Defendant's Answer Should Not Be Stricken and Why Default Judgment Should Not Be Entered in Favor of Plaintiff* [Doc. No. 63] (the "OSC");

a) Bankruptcy Noticing Center Certificate of Notice [Doc. No. 67];

b) Plaintiff's Notice of Motion and Motion in Limine No. 1: To Preclude Defendant from Introducing Exhibits and/or Witnesses at Trial [Doc. No. 60];

2) Plaintiffs' Update to the Court [Doc. No. 68]; and

3) Response to Order to Show Cause [Doc. No. 69].

[2] *See* Declaration of Peter J. Tormey in Support of Plaintiffs' Motion In Limine No. 1 to Preclude Defendant from Introducing Exhibits and/or Witnesses at Trial [Doc. No. 60] at ¶ 8.

[3] Reopening discovery as to Defendant would unjustifiably reward Defendant for delaying trial of this action. Defendant has already been afforded ample time to conduct discovery. Plaintiffs commenced this action on May 9, 2019. The deadline to complete expert discovery was July 13, 2020 and the deadline to complete non-expert discovery was July 24, 2020. Doc. No. 44.

[4] This deadline applies to both expert and non-expert discovery.

IN RE: CHRISTINA GREENFIELD, Chapter 7, Debtor.

Case No. 19-20785-NGH.

United States Bankruptcy Court, D. Idaho.

October 22, 2020.

MEMORANDUM OF DECISION

NOAH G. HILLEN, Bankruptcy Judge.

INTRODUCTION

Christina Greenfield ("Debtor") challenges the impartiality of the undersigned bankruptcy judge and asserts bias based on an adverse ruling, the Court's handling of its calendar in scheduling certain hearings, and a purported "union" that is "susceptible to questionable behavior" with the chapter 7 trustee, David Gardner ("Trustee").[1] Debtor further seeks reconsideration of the Court's order approving Trustee's employment of a realtor. Finally, Debtor seeks to "stay" Trustee from listing her home for sale until after adjudication of her pending § 522(f) motion and resolution of an adversary proceeding. A hearing was held, and the matters were taken under advisement. The following constitutes the Court's findings of fact and conclusions of law.

FACTUAL AND PROCEDURAL HISTORY

Debtor filed her chapter 7 petition on December 11, 2019. Debtor was initially represented by counsel, however, on January 30, 2020, Debtor filed a notice of self-representation. Doc. No. 20. Prior to hearing on Debtor's notice and issues arising therefrom, Debtor's counsel agreed to disgorge fees paid by Debtor, and he was granted leave to withdraw at a February 10, 2020 hearing. Doc. Nos. 24, 25, and 31. Debtor has since proceeded *pro se*. Doc. No. 37.

Debtor's schedules listed a $103,000 unsecured debt owed to Eric and Rosalynd Wurmlinger ("Creditors"). Doc. No. 1 at 20. Creditors filed a proof of claim asserting a $261,083.21 debt, $170,000 of which was secured by a judgment lien encumbering Debtor's home located at 210 S. Parkwood Pl., in Post Falls, Idaho (the "Property"). Claim 4-1. On February 5, 2020, Creditors filed an adversary proceeding seeking a determination that the judgment debt owed to them by Debtor is non-dischargeable under § 523(a)(6). Adv. Doc. No. 1.[2]

On June 16, 2020, Debtor filed a "Motion to Avoid Lien Under 11 U.S.C. § 522(f)" seeking to avoid Creditor's judgment lien, and she set the matter for a hearing commencing on July 13, 2020. Doc. Nos. 46, 47. Creditors timely objected. Doc. No. 50. On July 1, 2020, Trustee filed an application for approval of employment of a realtor to sell the Property and provided notice and opportunity to object under LBR 2002.2(d). Doc. No. 51 (the "Application").

Debtor sought to continue the July 13, 2020 hearing based on assertions that the Coronavirus ("COVID-19") pandemic prevented her from marshalling necessary evidence to support her lien avoidance motion. Doc. No. 56. On July 10, 2020, the Court vacated the July 13, 2020 hearing and required Debtor, Creditors, and Trustee to each submit on or before August 28, 2020, a status report regarding the need for and their readiness regarding an evidentiary hearing as to the pending motions. Doc. No. 57.

On July 21, 2020, Debtor timely objected to Trustee's Application, raising concerns over potential COVID-19 exposure. Doc. No. 59. Despite the notice in Trustee's Application requiring an objecting party to set the matter for hearing, Debtor did not contact the Court for a calendar date, and Trustee's Application and Debtor's objection thereto were not initially set for hearing.

Debtor filed her status report on August 27, 2020. Doc. No. 63. Notably, while Debtor indicated she was ready to set a hearing on the § 522(f) motion, she also stated she would "be submitting an amended motion." *Id.* at ¶ 4. Debtor's status

report did not address her July 21, 2020 objection to Trustee's Application. Trustee filed his status report on August 28, 2020. Doc. No. 64. Trustee indicated he did not see any evidentiary issues regarding his Application, but he would participate in an evidentiary hearing if necessary. *Id.* Creditors filed their status report on August 29, 2020. Doc. No. 65. Creditors indicated they had no objection, legal or evidentiary, to the Application. *Id.* Creditors stated there were discovery issues regarding Debtor's § 522(f) motion, but they had not been able to meet and confer with Debtor to address the issues. *Id.* Creditors also asserted that a hearing on the § 522(f) motion would be premature given those issues. *Id.*

On August 31, 2020, this case and the related adversary proceeding were assigned to the undersigned bankruptcy judge. Doc. No. 66; Adv. Doc. No. 51. Debtor requested a hearing date for her § 522(f) motion, and the Court informed her that its next available evidentiary hearing date was November 2, 2020. However, Debtor did not file a notice of hearing. Given review of the status reports and the docket, the Court set Trustee's Application for a non-evidentiary hearing on September 21, 2020. Doc. No. 68.

On September 21, 2020, the Court held a telephonic hearing on Trustee's Application. Debtor, Trustee, and Creditors participated and made oral statements. The Court overruled Debtor's objection and approved Trustee's Application, and it entered an order accordingly. Doc. No. 74.

On September 25, 2020, Debtor filed an amended motion to avoid Creditor's lien under § 522(f). Doc. No. 76 (the "Amended § 522(f) Motion").[3] That same day, she attempted to set an emergency hearing for October 6, 2020, to hear various unfiled motions, including a motion to hear the Amended § 522(f) Motion on October 19, 2020, rather than the November 2 date provided by the Court. Doc. No. 78. On September 30, 2020, Debtor filed a notice vacating the October 6 hearing. Doc. No. 84. She also filed a new notice of hearing for October 19, 2020, on motions that had still not been filed and requested the Court vacate the November 2, 2020 hearing date. Doc. No. 85. At that time, Debtor had not filed and served a notice of hearing setting her original § 522(f) motion nor her Amended § 522(f) Motion for hearing on November 2, 2020. The Court entered an order vacating the emergency hearing set for October 6, 2020, conditioning the occurrence of an October 19 hearing on the filing of the motions referenced in the notice by October 5, 2020, and ordering any responses to those motions to be filed by October 13, 2020. Doc. No. 86.

On October 1, 2020, Debtor filed her three-part motion, seeking recusal of the undersigned judge under 28 U.S.C. § 455, reconsideration of the Court's order approving Trustee's employment of a realtor, and a "stay of execution" against the listing of her residence for sale. Doc. No 88.[4] Trustee and Creditors did not file any responses to Debtor's motion although both appeared at the October 19, 2020 hearing.

DISCUSSION AND DISPOSITION

A. Disqualification

The Court will first address Debtor's motion seeking the recusal of the undersigned judge. Recusal in bankruptcy cases and proceedings is governed by 28 U.S.C. § 455. *See also* Seidel v. Durkin (In re Goodwin), 194 B.R. 214, 221 (9th Cir. BAP 1996); Rule 5004(a). That section states in relevant part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

In evaluating a motion under 28 U.S.C. § 455, "the judge to whom a recusal motion is addressed is presumed to be impartial . . . and there is substantial burden on the moving party to show that the judge is not impartial." In re Jones, 2002 WL 818275, *5 (Bankr. D. Idaho Apr. 2, 2002) (quoting In re Melendez, 224 B.R. 252, 277 (Bankr. D. Mass. 1998)) (internal quotation marks omitted). Moreover, "a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." Laird v. Tatum, 409 U.S. 824, 837 (1972).

Determining whether recusal is necessary in this case requires the Court to engage in a two-step process. First, analyzing whether the impartiality of the undersigned judge might reasonably be questioned under 28 U.S.C. § 455(a). Second, analyzing whether the undersigned judge has an actual personal bias under 28 U.S.C. § 455(b)(1).

1. Impartiality

Under 28 U.S.C. § 455(a), the Court must determine "whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." *United States v. Holland*, 519 F.3d 909, 913 (9th. Cir. 2008) (quoting *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990)) (internal quotation marks omitted). The standard under this subsection is whether a reasonable and objective person, knowing all the facts, would harbor doubts concerning the judge's impartiality. *United States v. Winston*, 613 F.2d 221, 222 (9th Cir. 1980); *see also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-61 and 865 (1988) (discussing the objective standard and the appearance of partiality). In conducting this review, a court must ask how the facts would appear to a "well-informed, thoughtful observer" and not a "hypersensitive or unduly suspicious" person. *Holland*, 519 F.3d at 913. Moreover, the Ninth Circuit instructs that this standard "must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *Id.* (quoting *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993)) (internal quotation marks omitted). In applying this objective standard to Debtor's arguments, the Court concludes recusal under 28 U.S.C. § 455(a) is not required.

Debtor argues the undersigned judge is acting partially because (1) the undersigned judge authorized Trustee's employment of a realtor and disregarded Debtor's COVID-19 concerns; (2) the undersigned judge set and ruled on Trustee's Application before addressing Debtor's § 522(f) motion; and (3) the undersigned judge refused to schedule a hearing on Debtor's motion to avoid Creditors' lien on the Property prior to trial in the adversary proceeding where Creditors are seeking to except their claim from discharge. Doc. No. 88 at 4-5.

a. Debtor's COVID-19 Health Concerns

Debtor disagrees with the Court's decision to authorize Trustee to employ a realtor and argues the undersigned judge is not following COVID-19 safety measures mandated by Idaho's Governor. Doc. No. 89 at ¶ 3. Debtor states she is a "senior with major health issues and [is] susceptible to the Coronavirus." Doc. No. 89 at ¶ 4. Allowing potential purchasers inside her home would therefore put her at risk. Debtor further argues Idaho's federal courts are allowing staff to work from home "and are not allowing any individuals into the Courtroom. Why Judge Hillen thinks that my home should be treated any differently is a mystery and poor judgment in my opinion." Doc. No. 89 at ¶ 6.

The Court's decision to approve Trustee's employment of a realtor is not inconsistent with its own COVID-19 guidelines. On May 11, 2020, the Chief Judges of the United States District and Bankruptcy Courts for the District of Idaho entered General Order No. 367 regarding "Continued Court Operations in Response to Coronavirus (COVID-19) and Idaho Governor's Guidelines for Reopening Idaho" (the "General Order"). The General Order declared that once Idaho moved into Stage 3 of the Governor's reopening plan, the federal courthouses would open to the public and trials would resume. Gatherings would be limited to no more than 50 people under Stage 3. In Idaho's Stage 4, gatherings of any size were authorized to occur, and worksites were unrestricted as to the return of employees. In all stages, people in public areas in the federal courthouses and the courtrooms would be required to wear face coverings/masks for the protection of others and themselves. In the courtroom, the presiding judge would decide whether witnesses testifying on the witness stand would wear a face covering/mask. Additionally, physical distancing of at least six feet is required to be observed.

The Coeur d'Alene courthouse, and Kootenai County, is currently in Stage 4 of the Governor's reopening plan. Debtor's argument that individuals are not permitted in the courthouse is not correct; the courthouses are open and following appropriate safety guidelines.[5] The Court is mindful of Debtor's concern in contracting COVID-19 from prospective purchasers entering her home. However, the sale of the Property and the process of listing and allowing interested buyers to view the Property were not before the Court upon Trustee's Application. As the Court made clear at the September 21 hearing, if Trustee elects to pursue a sale of the Property, Trustee, Realtor, and Debtor will need to work together to develop procedures that allow prospective purchasers to view the Property while adhering to proper safety protocols.[6] Thus the Court concludes that its approval of Trustee's employment of a realtor, even during the course of a pandemic, would not cause a reasonable person to believe the undersigned judge will resolve issues on a basis other than the merits.

b. Interactions with Trustee

Debtor also alleges the undersigned judge should be disqualified because he and Trustee (1) served as bankruptcy moot court coaches for the University of Idaho College of Law; (2) served as chapter 7 panel trustees in the District of Idaho; and (3) published articles in Eastern Washington Bankruptcy Notes in December 2011.[7] Doc. No. 88 at p. 4. Debtor alleges these connections "makes their union more susceptible to questionable behavior. One can only assume that the two of them shared personal conversations relating to debtors involved in bankruptcy proceedings." *Id.*

It is true that Trustee coached, along with another Northern Idaho bankruptcy attorney, the University of Idaho College of Law bankruptcy moot court team from the Moscow, Idaho campus. The undersigned judge also coached, along with a Boise, Idaho bankruptcy attorney, the University of Idaho College of Law bankruptcy moot court team from the Boise, Idaho campus. While these teams were geographically separate, the undersigned judge did have contact with Trustee regarding the moot court competition and organizing practice arguments between the teams via video conference. At no time did the undersigned judge discuss this case, or the related adversary proceeding, with Trustee. The undersigned judge was not aware of this case or the adversary proceeding until they were assigned.

It is also true that Trustee and the undersigned judge both served as chapter 7 panel trustees in the District of Idaho from 2014 to August 29, 2020, when the undersigned judge resigned from the panel. Trustee administers cases from the Northern Division of the District. The undersigned judge was a panel trustee administering cases arising in the Southern Division of the District. While a chapter 7 trustee, the undersigned judge would occasionally discuss legal issues arising in cases with other trustees in the District, including Trustee. The undersigned judge estimates that approximately two or three times a year, he and Trustee would discuss a difficult issue in one of their cases. However, the undersigned judge never discussed this case, or the related adversary proceeding, with Trustee.

Regarding the alleged connection involving the articles published in Eastern Washington Bankruptcy Notes, the undersigned judge had no contact with Trustee regarding that matter. The undersigned judge did not work with Trustee on any articles or coordinate submission of those articles to that publication. In addition, the substance of those individual articles (both the undersigned's and Trustee's) are unrelated to this case.

"It is a fact of legal life that former law clerks, and former law firm partners, and lawyers with whom a judge has cordial and even friendly relationships, may appear in front of that judge. Their success must be based on the evidence and the law, not on relationships." *Wisdom v. Gugino (In re Wisdom),* 2014 WL 2175148 at *4 (Bankr. D. Idaho May 23, 2014). A reasonably objective person, fully informed of the facts set forth above, would conclude the undersigned judge is impartial and Trustee's success before this Court, or lack thereof, will be based on the evidence and law only. Debtor fails to allege any facts from which a well-informed and objective person would harbor doubts concerning the undersigned judge's impartiality toward Trustee. This objective standard cannot be satisfied by speculation about the undersigned judge's state of mind or speculation about conversations Trustee and the undersigned judge may have had. Without more objective manifestations of alleged partiality—and adverse rulings alone cannot be so characterized—no reasonable person would conclude that the undersigned judge should disqualify himself from this case or the related adversary proceeding.

c. Scheduling of Hearings

Debtor also points to the Court's scheduling of a hearing on her § 522(f) motion in relation to the hearing on Trustee's Application and trial in the related adversary proceeding as further proof of partiality. She alleges the undersigned judge is acting partial and violating her due process rights because her § 522(f) motion was not scheduled to occur before hearing on Trustee's Application and the trial in the adversary proceeding. *See* Doc. No. 88 at 2; Doc. No. 89 at 2.[8] Debtor argues Trustee, who has now been authorized to employ a realtor, will sell the Property before trial in the adversary proceeding or hearing on her § 522(f) motion, which will only serve to reward Trustee and Creditors. Debtor further argues that if she obtains the full relief she is entitled to under her Amended § 522(f) Motion, she "could possibly quash" the adversary proceeding. Doc. No. 88 at 3.

The Court concludes that a well-informed and objective person would not harbor doubts concerning the undersigned judge's impartiality based on how this Court managed its calendar and scheduled the various matters for hearing and trial. Nor has this Court violated Debtor's due process rights.

The timeline outlined above gives important context to the scheduling of hearings on the relevant matters. Initially, it is important to note that the Court has broad discretion in controlling its calendar. While Debtor complains she has been unable to obtain a hearing on her § 522(f) motion prior to Trustee obtaining a hearing on his Application, there are logical reasons for this. First, no party indicated an evidentiary hearing was needed on Trustee's Application. Therefore, the Court could hear legal argument on Trustee's Application at a telephonic hearing.[9] The parties, however, contemplated evidence and testimony would be required to address Debtor's motion to avoid Creditors' judgment lien under § 522(f). In other words, the hearing would need to take place in-person at the Coeur d'Alene courthouse. The Court is scheduled to next travel to Coeur d'Alene on November 2, 2020. Second, Debtor's status report represented that she planned on filing an amended § 522(f) motion. Setting a hearing on Debtor's § 522(f) motion would be premature until she filed the same and parties in interest were given a reasonable opportunity to respond. Given these facts, the Court gave Debtor a November 2, 2020 hearing date for the Amended § 522(f) Motion, commencing at 10:00 A.M. PST. This would permit Debtor to prosecute the Amended § 522(f) Motion prior to the commencement of trial in the adversary proceeding, which was scheduled to start at 1:30 P.M. PST on November 2, 2020.[10]

As to Debtor's due process concerns over the sale of the Property prior to hearing her Amended § 522(f) Motion or trial in the adversary proceeding, it is important to note that Trustee has not sought court approval for such a sale. Any sale would require Court approval pursuant to 11 U.S.C. § 363(b) and notice to all creditors and Debtor. *See* Rule 2002. Debtor would then have an opportunity to object. At this time, Trustee has only been authorized to employ a realtor. Debtor alleges in her Amended § 522(f) Motion that the Property requires substantial repairs, which negatively impacts the Property's fair market value. Given these allegations, it is not clear Trustee will be able to sell the Property at a price sufficient to obtain Court approval of the sale. A realtor may need to provide Trustee with guidance as to how any needed repairs impact the potential sale of the Property. Trustee should be, and is, able to hire an experienced realtor to obtain such guidance regarding this issue.

Finally, Debtor's argument that a ruling in her favor on the Amended § 522(f) Motion could "quash" the adversary proceeding is incorrect. The legal issues presented in the Amended § 522(f) Motion and in the adversary proceeding are independent and distinct. Debtor's Amended § 522(f) Motion seeks to avoid Creditor's judgment lien from the Property. If successful, Creditors would hold a fully unsecured claim against Debtor. At issue in the adversary proceeding is whether Creditors' claim against Debtor is subject to discharge in this bankruptcy case. If Debtor prevails on her Amended § 522(f) Motion and Creditors hold a fully unsecured claim, Creditors would still be permitted to prosecute the adversary proceeding and attempt to prove their claim is excepted from discharge. Thus, the Amended § 522(f) Motion is not a pre-requisite to trial in the adversary proceeding.[11]

2. Bias

The distinction between 28 U.S.C. § 455(a) and 28 U.S.C. § 455(b)(1) is modest. However, the test under 28 U.S.C. § 455(b)(1) "is not one of the objective viewer's perspective, or of the movant's suspicions; rather it is one of the judge's knowledge of actual bias." *In re Wisdom*, 2014 WL 2175148 at *4 (citing *In re Syntax-Brillian Corp.*, 400 B.R. 21, 26 (Bankr. D. Del. 2009)) (noting that 28 U.S.C. § 455(b) requires the judge "to disqualify himself or herself on account of an actual (as opposed to perceived) bias or conflict"). Notably, "judicial rulings alone almost never constitute a valid basis" for finding bias or partiality. *Liteky v. United States*, 510 U.S. 540, 555 (1994). As stated in *Goodwin*, "even if [the judge] erred, that does not constitute bias. A judge may be wrong without being prejudiced." 194 B.R. at 224.

The Court concludes that the undersigned judge does not have a deep-seated favoritism that would make fair judgment in this case impossible. Despite being a professional colleague with Trustee, the undersigned judge has no hesitation in determining he is impartial when Trustee appears before the Court. Trustee's success before this Court is based on the evidence and the law. Trustee is held to the same standard as other litigants that appear before the undersigned judge.

Nor does the Court lack the required impartiality or have any bias regarding Debtor. The undersigned judge has only recently been assigned this case. The undersigned has no prior knowledge of Debtor and has never interacted with her outside of hearings in this case. The fact that Debtor has pursued this motion creates no deep-seated antagonism that would make fair judgment impossible nor any bias. Debtor was entitled to raise the issue, and the Court was required to address it.

In sum, under 28 U.S.C. § 455 and the relevant authorities, the undersigned judge is not required to recuse himself in this case or the related adversary proceeding.

B. Motion to Reconsider

Debtor requests the court reconsider its approval of Trustee's Application. Doc. No. 88 at 1. Motions to reconsider do not exist under the Federal Rules of Bankruptcy Procedure. *In re Ricks,* 2015 WL 6125559, *2 (Bankr. D. Idaho Oct. 16, 2015). When so asserted, they are treated as motions under Fed. R. Civ. P. 59(e) made applicable by Rule 9023. *Id.* This Court previously explained that "a party may move the court to alter or amend its judgment, so long as: (1) the court is presented with newly discovered evidence, (2) the court committed clear error or the initial decision was manifestly unjust, or (3) there is an intervening change in controlling law." *Zazzali v. Goldsmith (In re DBSI, Inc.),* 2018 WL 6931280, *2-3 (Bankr. D. Idaho Nov. 21, 2018) (quoting *Owen v. Lundstrom (In re Owen),* 2006 WL 2548787, *2 (Bankr. D. Idaho Aug. 31, 2006)). Moreover, such motions should not be used to reargue contentions already presented. "Motions to reconsider are not vehicles by which to make the same arguments as earlier made (even if hopefully more persuasively), or to raise arguments that should have been made but were not." *Id.* (quoting *In re Tonnemacher,* 2015 WL 8489036, *2 (Bankr. D. Idaho Dec. 10, 2015)); *accord* *In re Sterling Mining Co.*, 2009 WL 2705825, *2 (Bankr. D. Idaho Aug. 24, 2009).

Here, Debtor has not established that reconsideration is warranted. Of the three grounds for reconsideration identified in *Zazzali,* Debtor's arguments relate only to the second ground—that the court committed clear error or the initial decision was manifestly unjust. Debtor asserts the Court's approval of Trustee's employment of a realtor was irrational and violated her right to due process. Doc. No. 88 at 2. However, Debtor's objection to Trustee's Application, Doc. No. 51, was based exclusively on the assertion that she is vulnerable to contracting COVID-19 and suffering serious complications therefrom. At the hearing on Trustee's Application, the Court considered Debtor's concerns given the pandemic, and Trustee's explanation that the realtor would follow appropriate COVID-19 safety measures adopted by the local MLS for listing and showing properties in this difficult environment. The Court fully considered Debtor's position at the hearing and noted that the realtor, Trustee, and Debtor would need to coordinate and establish appropriate safety guidelines for listing and showing the Property, but ultimately Debtor's objection did not speak to the Trustee's employment of the professional.[12] A review of the docket demonstrates Trustee provided sufficient notice of his Application, and Debtor had an opportunity to object and be heard orally and through written submissions. As explained above, the employment of a realtor is a preliminary step, and Trustee will be required to obtain approval for sale of the Property. Thus, Debtor's due process rights have not been violated, and the Court's approval of Trustee's Application was not manifestly unjust.

For these reasons, Debtor's motion for reconsideration of the Court's approval of Trustee's employment of a realtor will be denied.

C. Motion for Stay of Execution

Debtor requests a "Stay of Execution on listing her property until all other matters are resolved in this case." Doc. No. 88 at 5. Though stylized as a stay of execution, Debtor essentially requests the Court enjoin Trustee from taking steps to sell property of the estate. A request to enjoin a trustee from selling property of the estate requires an adversary proceeding. Rule 7001; *In re Innovative Commc'n Co., LLC,* 2008 WL 4755763, *4-5 (D.V.I. Oct. 27, 2008); *Gazes v. DeArakie (In re DeArakie),* 199 B.R. 821, 824 (Bankr. S.D.N.Y. 1996). Seeking such relief through a motion is procedurally improper. Thus, Debtor's motion for a "Stay of Execution" will be denied.

CONCLUSION

Based on the foregoing, Debtor's combined motion for recusal, reconsideration, and a stay of execution, Doc. No. 88, will be denied. The Court will enter an appropriate order.

[1] Unless otherwise indicated, all statutory citations are to the Bankruptcy Code, Title 11 U.S.C. §§ 101-1532, and "Rule" citations are to the Federal Rules of Bankruptcy Procedure.

[2] On October 16, 2020, Creditors moved to voluntarily dismiss that adversary proceeding, *Wurmlinger v. Greenfield,* No. 20-07005-NGH, at Adv. Doc. No. 55, and that motion has been set for hearing on November 2, 2020. As a result of the motion to dismiss, the Court vacated the trial scheduled to commence on November 2, 2020.

[3] Creditors responded to the Amended § 522(f) Motion. Doc. No. 96.

[4] The Court entered orders clarifying that the October 19, 2020 hearing would be limited to Debtor's three-part motion and setting a separate evidentiary hearing on Debtor's Amended § 522(f) Motion for November 2, 2020. Doc. Nos. 93, 94.

[5] In-person trials and contested hearings on evidentiary matters are being held even in Stage 3.

[6] The Parties have some flexibility on fashioning adequate protocols, which may include physical distancing, mandated masks or face coverings, mandated gloves, adequate cleaning procedures, and restricting in-home viewings to certain times when Debtor is not present. Notably, Debtor has been working with various contractors to obtain repair bids regarding the Property during the pandemic, which has required her to accommodate individuals entering the Property. *See* Doc. No. 56 at p. 2.

[7] Debtor also alleges Trustee is employed with the same law firm that represents other members of her family in court proceedings and those family members utilized the litigation with Creditors to support their claims. The Court has no knowledge regarding this allegation, and any possible conflict arising with Trustee would not extend to the undersigned judge and would not require the recusal of the same.

[8] At hearing, Debtor asserted a belief or suspicion that some form of post-petition *ex parte* communication occurred between the undersigned and Trustee leading to the scheduled hearing of Trustee's Application prior to hearing Debtor's motion to avoid Creditors' judgment lien on the Property. No such communication occurred.

[9] Consistent with General Order 367, the Court has been holding telephonic hearings on all non-evidentiary matters due to COVID-19.

[10] At the October 19, 2020 hearing, Debtor expressed concerns over the Court setting other matters for November 3 when the trial was scheduled to occur. Given the Court's limited dates in Coeur d'Alene, the Court routinely sets multiple matters to be heard. Such settings do not indicate any partiality or pre-judgment on the part of the Court as to the merits of the matters set.

[11] Given Creditors' pending motion to dismiss the adversary proceeding and the Court's decision to vacate the adversary trial, Debtor's concerns over the sequence in which the matters are to be heard has likely been eliminated.

[12] In short, Debtor's due process concerns do not appear to stem from Trustee's employment of a professional realtor, but from the logical next step of Trustee attempting to sell the Property with the assistance of that realtor. To the extent there were due process issues in Trustee's employment of such a professional, they were not fully developed and presented to the Court. To the extent there are due process concerns over the sale of the Property, they are rejected as premature.

In re Mattox Debtor.
In re: Bradley J. Mattox, Debtor.

Case No. 18-10101-13.

United States Bankruptcy Court, D. Kansas.

October 19, 2020.

Order Granting Debtor's Motion to Vacate

DALE L. SOMERS, Chief Bankruptcy Judge.

Debtor Bradley J. Mattox and the Chapter 7 Trustee of his bankruptcy estate have been engaged in a dispute over the exemption of Debtor's homestead for more than two years.[1] The parties settled their dispute by agreeing that the Trustee could sell "approximately 8 or 9 acres" on the west side of Debtor's property, which would be surveyed at a future point to establish the exact legal description. Unfortunately, the survey that was completed did not reflect what was agreed to at mediation. All parties agree to that fact. Debtor now seeks to set aside the supplemental order establishing the incorrectly surveyed area as the property to be sold by the Chapter 7 Trustee. The Trustee opposes, arguing that Debtor missed his opportunity to object, the supplemental order that was entered is final, and Debtor has waited too long to set that order aside.

The Court grants Debtor's motion to vacate. The Court would not have signed and entered the supplemental order if it had realized the surveyed legal description varied from the parties' agreement in the significant way it did. The Trustee should obtain a new survey, endeavoring to establish the actual parameters of the parties' settlement agreement.

I. Findings of Fact[2]

Debtor filed a Chapter 7 bankruptcy petition on January 23, 2018. The petition was precipitated by the filing of a civil action against Debtor by a local law firm for the collection of a $177,834.67 debt for legal services rendered.[3] The debt to this creditor is Debtor's only significant liability.

Debtor lives on his family farm, just west of Derby, Kansas. Debtor's Schedule A described his real property as 4418 E. 83rd St. S., in Derby, Kansas, valued at $244,970.[4] Debtor's Schedule C then further described the real property as:

> S ½ NE ¼ EXC W 419.8 FT & EXC 17.44A FLDY CC A-29459 & EXC S 35 FT E 1536 FT & EXC COND. CASE 98C-1442 SEC 11-29-1E[5]

Debtor claimed this real property exempt under K.S.A. § 60-2301 (providing for exemption of "a homestead to the extent of 160 acres of farming land . . . occupied as a residence by the owner . . . together with all the improvements on the same"). [6]

The Chapter 7 Trustee objected to Debtor's claimed homestead exemption, arguing that the claimed "43 acres of property" were not farming land, but were instead devoted to running a rodeo arena operated as a commercial business.[7] Debtor admits that he has an arena on his property where he holds rodeos and other events. The Court scheduled the matter for trial and the pretrial order on the issue stipulated the following:

> The debtor has claimed as exempt real estate described as: "S/2 NE/4, Except W 519.8 ft, and Except 1744 acres FLDY CCA-29459, and Except S 35 ft E 1536 ft, and Except Cond. Case 986-1442, Sec. 11-29-IE," containing approximately 43 acres.

Such property lies outside any city limit.[8]

Ultimately, the matter did not go to trial, but was mediated.

Following the mediation, the parties settled their dispute. The settlement agreement has the following language:

> 4. Mattox waives his claim of exemption as [to] a strip of land along the full west side of his real estate as shown on the attached aerial map. The "waiver property" is approximately 8 or 9 acres and is bounded by the west, north and south sides of the debtor's ownership, with the east side of the "waiver property" being the tree line as shown.
>
> 5. The "waiver property" will be subject to survey to establish its exact legal description. The parties further agree that ad valorem property taxes will be apportioned by agreement with the County.
>
> 6. Once established the "waiver property" will be subject to sale by the Trustee.[9]

The attached Exhibit A is reproduced here in its entirety. In the below image, Debtor's neighbor's property is shown as the far west "rectangle" of land. Debtor's property begins on the tree line to the west of the written words "waive homestead." At trial, Debtor testified that the east line of the waived homestead indicated on the below picture as a pen-marked line, was intended to include only bare land (containing no buildings). Debtor testified that he had just guessed at the mediation on the acreage, and that he truly had no idea how many acres would have been included in the "waived" portion.

EXHIBIT A

The settlement agreement was approved by the Court on May 29, 2019.[10]

More than seven months passed. On February 14, 2020, the Chapter 7 Trustee filed an application to employ a surveyor to conduct a survey "of the non-exempt real property of the bankruptcy estate."[11] The surveyor never contacted Debtor personally. Then on March 2, 2020, the Trustee filed a motion for a supplemental order on his objection to claim.[12] In that motion, the Trustee reported that he had obtained a survey of the "waiver property," and that the survey described the "waiver property" as:

> Commencing at the S.W. Corner of the NE1/4 of Sec. 11, Twp. 29-S, R-1-E, of the 6th P.M., Sedgwick County, Kansas; thence S89°55'40"E, along the South line of said NE1/4, 419.81 feet; thence N00°21'20" E, parallel with the West line of said NE1/4, 65.53 feet to the Point of Beginning and being the North Right-of-Way of 83rd St. S. as Established by Condemnation Case No. 98C1442; thence continuing N00°21'20"E, 1258.54 feet to the North Line of the S1/2 of said NE1/4; thence S89°28'40"E, along said North line 350.00 feet; thence S00°21'20"W, 1255.35 feet to said North Right-of-Way line of 83rd St. S.; thence S90°W, along said Right-of-Way 350.00 feet to the Point of Beginning.

A copy of the survey sketch was attached as an exhibit, and it showed the property as follows:

In the above image, the southwest corner of Debtor's property starts at the area marked "P.O.B." (for Point of Beginning). The surveyed property extends to the east and north to encompass the rectangle in the middle of the page, with "unplatted" areas on both sides, and results in a total of 10.10 acres. The above surveyed area includes land with a barn and utility services that is visibly to the east of the line drawn on the map included with the settlement agreement. No objections to the motion were filed, and an order was entered on March 17, 2020, granting the Trustee's motion (hereinafter, the "Supplemental Order").[13]

This time, four months passed. The Chapter 7 Trustee next filed an application to employ an auctioneer on July 15, 2020,[14] and on August 8, 2020, a notice of the intended sale by auction of the property was filed.[15] At this point, on August 10, 2020, Debtor's counsel filed a motion to vacate the Supplemental Order.[16] In that motion to vacate, counsel argued:

> Unknown to Debtor and his counsel, the survey description does not accurately describe the Tract, as it includes additional land to the east of the agreed easterly boundary of the Tract. Upon learning of the discrepancy, Debtor's counsel advised the trustee and interested creditors counsel that there appeared to be a mistake, and that counsel wanted to view the tract. This was in early March 2020 at the time the state was shutting down due to the COVID pandemic.

> Counsel has now visited with Debtor and viewed the Tract; it is clearly not what was agreed to at the Mediation. However, the Trustee's counsel advises that the Trustee intends to offer for sale the Tract as surveyed, and not make adjustments to the description.
>
> As further evidence of the inaccuracy of the survey, Counsel for the Trustee has advised Debtor's counsel that the appraiser explained that Sedgwick County zoning and land use regulations prohibit new tracts being platted of less than 10 acres. Unknown to Counsel and the parties thereto, the appraiser surveyed a larger tract than had been agreed to at the mediation in order to comply this regulation. The above-mentioned county regulation was not discussed nor know[n] to be an issue at the mediation.[17]

Debtor moved to vacate the order because it was "entered by mistake," and also objected to the Trustee's notice of intended sale.

At trial, the Chapter 7 Trustee acknowledged that the survey was not correct compared to what was agreed at the settlement, but that Debtor knew a survey would occur and should have acted at the time the legal description was presented in the supplemental motion. The Chapter 7 Trustee also acknowledged that he had hired the surveyor, and it was the surveyor who had communicated the "need" to have the survey yield ten acres so that the property could be marketed for sale.

Debtor testified that it was a neighbor that notified him of the survey flags on his property, and that he contacted his counsel as soon as he saw that the flags extended beyond what he had agreed at the settlement. Debtor's counsel claimed he visited the property and assessed the situation as soon as possible after restrictions related to the 2020 Covid-19 pandemic were eased and it was safe for him to travel to see the property.

II. Conclusions of Law

Contested matters concerning the "allowance or disallowance of claims against the estate or exemptions from property of the estate" are core matters under 28 U.S.C. § 157(b)(2)(B) over which this Court may exercise subject matter jurisdiction.[18]

A. Timing under Federal Rule of Civil Procedure 60(b)(1)

Federal Rule of Civil Procedure 60, incorporated to bankruptcy via Federal Rule of Bankruptcy Procedure 9024, permits relief from final orders. Under Rule 60(b)(1), upon the filing of a "motion and just terms," the court may relieve a party from a final order if there has been "mistake, inadvertence, surprise, or excusable neglect."

The Chapter 7 Trustee's first challenge to Debtor's motion is as to its timeliness. A motion filed under Rule 60(b)(1) "must be made within a reasonable time" and "no more than a year after the entry of the judgment or order or the date of the proceeding."[19] The Supplemental Order was entered on March 17, 2020, and Debtor filed his motion to vacate that order five months later, on August 10, 2020. The motion was, therefore, filed within the year requirement, and the Court's only task is to decide if five months is reasonable in the circumstances present.

The testimony at trial was that Debtor recognized the error of the Trustee's survey once he saw the stakes in the ground. But he also testified that he had no idea how long the stakes had been there when he saw them. It is undisputed that Debtor and his counsel received actual notice of the motion in March 2020, setting out the incorrect legal description from the survey. And Debtor testified that he did contact counsel as soon as he saw the stakes indicating the incorrect boundary line. Counsel claimed that because of the timing of the motion and Supplemental Order occurring right as Covid-19 restrictions began, combined with the need to see the physical land in person, he did not travel to Debtor's land until the summer of 2020, as soon as it was safe to do so. The Court concludes that, considering the circumstances, the five-month lapse in time between the entry of the Supplemental Order and the motion to vacate was reasonable. Debtor contacted his attorney as soon as he knew there was a problem

B. Meeting Rule 60(b)(1)'s Burden of Proof

Moving on to the substance of Debtor's motion, Debtor must show he is entitled to relief under Rule 60(b)(1) based on mistake. Rule 60(b) "is an extraordinary procedure," that should be utilized only "upon a showing of good cause within the rule."[20] The burden to prove grounds for relief under Rule 60(b)(1) is on the party moving to have the judgment set aside.[21]

The Tenth Circuit has directed that:

> Rule 60(b)(1) motions premised upon mistake are intended to provide relief to a party in only two instances: (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order.[22]

The Tenth Circuit has given lots of examples of what an "excusable litigation mistake" is *not*. An excusable litigation mistake is not "a deliberate and counseled decision by the complaining party."[23] In addition, if a party "simply misunderstands or fails to predict the legal consequences of his deliberate acts," then that is not an excusable litigation mistake.[24] The Tenth Circuit has also said that "Rule 60(b) does not provide relief for mistakes made in the negotiation of a contract or a stipulation (which is treated like a contract)."[25] And as a final example, "[c]arelessness by a litigant or his counsel does not afford a basis for relief under Rule 60(b)(1)."[26]

To the contrary, there is not a lot of guidance on what an excusable litigation mistake *is*. The Tenth Circuit has said that an excusable litigation mistake is one which "a party could not have protected against, such as counsel acting without authority."[27] In addition, the Tenth Circuit has advised that "Rule 60(b)(1) deals with mistakes that occur in the judicial process of enforcing whatever rights might arise from the historic facts."[28] For example, Rule 60(b)(1) would *not* apply if a mistake arises in the negotiation of an underlying stipulation, but it *would* apply to "the subsequent enforcement of the stipulation by the court."[29] In addition, the mistake must be excusable, meaning that the party is not at fault.[30]

Debtor argues that the Supplemental Order should be vacated based on mistake under Rule 60(b)(1) because the land description reflected in the Supplemental Order was not intended by either party in their settlement agreement. The Trustee admits that the east boundary of the legal description is incorrect. He acknowledges that the east line was established by the surveyor, based on the surveyor understanding that he needed to extend the "waiver property" to ten acres for the Trustee to be able to sell it. All parties acknowledge that the line that was drawn by the survey is *not* what they agreed to in their settlement.

Despite all this, because the settlement was that the "waiver property" would be "8 or 9 acres," the Chapter 7 Trustee argues that his legal description yielding "10.10 acres" should be allowed to stand. But the settlement was very clear about the boundaries, and only gave an estimate as to the acreage. It is the boundaries that were explicitly agreed, and that is what all parties believed controlled. The parties specifically agreed that the east boundary would be the tree line as shown on the exhibit to their settlement. Yes, Debtor at the settlement discussed that this area was eight or nine acres, but he credibly testified that it was clear at the settlement that his guess was *just* a guess, nothing more. That was the entire point of getting the land surveyed: to obtain the legal description.

There was simply no reason for Debtor or his counsel to think the Chapter 7 Trustee would have obtained a survey with a legal description that blatantly exceeded their agreement. As the Tenth Circuit has noted, "Rule 60(b) should be liberally construed when substantial justice will thus be served."[31] The Court concludes that the current scenario is more like the examples given by the Tenth Circuit permitting relief under Rule 60(b)(1) based on mistake. The situation that occurred was not one which could have been protected against, and Debtor notified his counsel as soon as he saw survey markers that seemed incorrect. The mistake did not arise in the negotiation of the settlement, but arose in the judicial enforcement of that settlement through the obtaining of the Supplemental Order. As a result, the Court concludes that Debtor has carried his burden to prove that he is entitled to relief from the Supplemental Order under Rule 60(b)(1) on the basis of an excusable litigation mistake.

III. Conclusion

The Court grants Debtor's motion to vacate[32] under Rule 60(b)(1). Debtor has carried his burden to show that the Supplemental Order, entered by this Court on March 17, 2020,[33] should be set aside. The parties' settlement requires a survey to establish a legal description for the "waiver property," defined as "bounded by the west, north and south sides of the debtor's ownership, with the east side of the `waiver property' being the tree line as shown" in the referenced aerial image. Once this legal description is established, the property "will be subject to sale by the Trustee," per the parties' agreement.

It is so Ordered.

[1] Debtor appears by WiUiam H. Zimmerman, Jr., and the Chapter 7 Trustee, J. Michael Morris, appears personaUy.

[2] The following facts were either established at trial or taken from the Court's record. *Tal v. Hogan*, 453 F.3d 1244, 1235 n.24 (10th Cir. 2006) (court may take judicial notice of "its own files and records" to show their contents, not to prove the truth of the matters therein).

[3] Doc. 1 pp. 39 and 43.

[4] Doc. 1 p.22.

[5] Doc. 1 p. 35.

[6] Doc. 1 p. 33.

[7] Doc. 25.

[8] Doc. 41 p. 2.

[9] Doc. 58p.3.

[10] Doc. 60 (Order Approving Settlement).

[11] Doc. 62.

[12] Doc. 65.

[13] Doc. 69.

[14] Doc. 71.

[15] Doc. 73.

[16] Doc. 77.

[17] Doc. 77 11 4-6.

[18] This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Amended Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy Judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective June 24, 2013. D. Kan. Standing Order 13-1, *printed in* D. Kan. Rules of Practice and Procedure (March 2018).

[19] Fed. R. Civ. P. 60(c)(1).

[20] *Cessna Fin. Corp. v. Bielenberg Masonry Contracting Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983).

[21] *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990).

[22] *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999).

[23] *Id.*

[24] *Id. See also Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 578 (10th Cir. 1996) (""Rule 60(b)(1) is not available to provide rehef when a party takes deliberate action upon advice of counsel and simply misapprehends the consequences of the action.").

[25] *Cashner*, 98 F.3d at 578.

[26] *Pelican Prod. Corp.*, 893 F.2d at 1146.

[27] *Yapp*, 186F.3dat 1231.

[28] *Cashner*, 98 F.3d at 578.

[29] *Id.*

[30] *See Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) ("This leaves, of course, the Rule's requirement that the party's neglect be `excusable.'")

[31] *Cessna Finance Corp.*, 715 F.2d at 1444 (internal quotation omitted).

[32] Doc. 77.

[33] Doc. 69.

In Re: Brian R. Somogye, Chapter 7, Debtor.
Jim Ott and Linda L. Ott, Plaintiff(s),
v.
Brian R. Somogye, Defendant.

Case No. 18-30927, Adv. Pro. No. 18-03037.

United States Bankruptcy Court, N.D. Ohio, Western Division.

July 28, 2020.

MEMORANDUM OF DECISION ON MOTION TO EXTEND DEADLINE TO FILE APPEAL

MARY ANN WHIPPLE, Bankruptcy Judge.

This adversary proceeding is before the Court for decision on Plaintiffs Jim and Linda Otts' ("Plaintiffs" or "Otts") Motion to Extend Time to File Notice of Appeal [Doc. # 50] ("Motion"), Defendant Brian Somogye's ("Defendant" or "Somogye") objection to the Motion [Doc. # 52] and Plaintiffs' reply [Doc. # 53]. The Court entered judgment against Plaintiffs on their complaint on March 30, 2020, making April 13, 2020, the deadline to file a notice of appeal. Fed. R. Bank. P. 8002(a)(1). Plaintiffs missed the deadline. Now they ask the Court to extend the time for filing a notice of appeal under Bankruptcy Rule 8002(d)(1)(B), which requires a showing of excusable neglect. Fed. R. Bankr. P. 8002(d)(1)(B).

The district court has jurisdiction over Defendant's underlying Chapter 7 bankruptcy case and all civil proceedings in it arising under Title 11, including this adversary proceeding. 28 U.S.C. § 1334(a) and (b). The Chapter 7 case and all proceedings in it arising under Title 11, including this adversary proceeding, have been referred to this Court for decision. 28 U.S.C. § 157(a) and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio. Proceedings to determine the dischargeability of particular debts are core proceedings that this Court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2)(I).

For the reasons that follow, the Motion will be denied.

PROCEDURAL BACKGROUND

Plaintiffs' complaint against Defendant sought a determination that a debt he owed them based on a state court judgment in their favor against him is nondischargeable under 11 U.S.C. § 523(a)(2)(A) because of fraud. After a bench trial on the merits, the Court entered judgment on the dischargeablity complaint against Plaintiffs and in favor of Defendant. [Doc. # 45]. [1] At trial, two lawyers from separate law practices represented Plaintiffs. The judgment, along with the Court's separate memorandum of decision setting forth its findings of fact and conclusions of law, [Doc. # 44], were both docketed by the Clerk on March 30, 2020. Both the judgment and memorandum of decision were immediately transmitted by the Bankruptcy Noticing Center on March 30, 2020, to Plaintiffs' lawyers and Defendant's lawyer by e-mail through the Court's CM/ECF electronic filing system at 1:55 p.m. (EDT). [*Id.*] [Doc. ## 47, 46]; Fed. R. Bankr. P. 5005(a)(2), 9036; LBR 5005-4. The adversary proceeding docket shows neither e-mail was bounced back as undeliverable. Both the judgment and memorandum of decision were mailed by the Bankruptcy Noticing Center on April 1, 2020, by first class mail, postage prepaid, directly to Plaintiffs and Defendant. [Doc. ## 47, 46]. The adversary proceeding docket shows the mailings were not returned as undeliverable.

After entry of judgment against Plaintiffs, neither party filed any post-trial motions for additional findings under Bankruptcy Rule 7052, to alter or amend the judgment under Bankruptcy Rule 9023, for a new trial under Bankruptcy Rule 9023, or for relief from judgment under Bankruptcy Rule 9024. *See* Fed. R. Bankr. P. 8002(b). Any such motion was due within 14 days after entry of the judgment. Fed. R. Bankr. P. 7052, 9023, 9024 and 8002(b)(1)(D). Plaintiffs electronically filed the Motion to

Extend Time to File Notice of Appeal, now before the Court, 25 days after entry of the judgment, on Friday April 24, 2020. [Doc. # 50]. Defendant opposes the requested extension. [Doc. # 52].

LAW

The Bankruptcy Rules require parties to act quickly if they are going to appeal a judgment or order. A party seeking to appeal a bankruptcy court judgment must file a notice of appeal within 14 days after entry of the judgment. Fed. R. Bankr. P. 8002(a)(1).[2] The notice of appeal must be filed with the bankruptcy court clerk. Fed. R. Bankr. P. 8003(a)(1). Alternatively, the party may ask the bankruptcy court to extend the time for filing a notice of appeal by filing a motion within that same 14-day period after entry of judgment. Fed. R. Bankr. P. 8002(d)(1)(A).[3] If neither a notice of appeal nor a motion for extension of time is filed during that 14-day period, the only alternative for filing a timely notice of appeal is to obtain an extension of the deadline by filing a motion within 21 days after the 14-day time period for appeal, provided the movant must show excusable neglect for missing the original 14-day deadlines. Fed. R. Bankr. P. 8002(d)(1)(B).

In this case, the 14-day deadlines under Rule 8002(a)(1) and (d)(1)(A) for filing timely a notice of appeal or motion to extend time for filing a notice of appeal were April 13, 2020, the Court's judgment having been entered on March 30, 2020. Plaintiffs filed neither a notice of appeal nor a motion to extend time to file a notice of appeal by April 13, 2020. Instead they filed their Motion seeking an extension of time to file a notice of appeal on April 25, 2020, which is within the additional 21-day time period allowed if a party shows excusable neglect. Plaintiffs' Motion is timely under Rule 8002(d)(1)(B). The issue before the Court is whether they have shown excusable neglect.

The United States Supreme Court provided guidance for determining excusable neglect in the context of a missed bankruptcy court-ordered filing deadline in the now-familiar case *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), which involved Bankruptcy Rule 9006 generally governing computing and extending time in bankruptcy matters. The Supreme Court explained that finding excusable neglect involves an equitable determination that should incorporate all relevant factors, including (i) danger of prejudice to the non-movant; (ii) the length of delay and its potential impact on judicial proceedings; (iii) the reasons for the delay, including whether it was within the reasonable control of the movant;[4] and (iv) whether the movant acted in good faith. Related principles emphasized by the Supreme Court in *Pioneer* are that: (1) the concept is an "elastic one," *id.* at 392; (2) it is not limited to omissions caused by circumstances beyond the control of the movant, *id.*; (3) inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect, *id.*; and (4) clients are held accountable for the acts and omissions of their chosen counsel, *id.* at 397.

In applying its guidance to the facts in *Pioneer,* the Supreme Court relied on the lower courts' factual findings that there was no indication of prejudice to the debtor in a late claim filing, the delay was not such that it would interfere with the efficient administration of the Chapter 11 case and the creditor and its counsel had acted in good faith. In evaluating the reason for the delay, the Supreme Court ultimately gave "little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date." *Id.* at 398. Rather, in affirming the Sixth Circuit's reversal of the bankruptcy court's finding that there was no excusable neglect and denial of the motion for leave to file a late proof of claim, the Supreme Court considered "significant" that the bankruptcy court's own claims bar date notice was unusual and ambiguous. *Id.*

Although *Pioneer* dealt with the interface between excusable neglect and the allowance of a late proof of claim in a Chapter 11 bankruptcy case, courts apply *Pioneer* in other procedural contexts. Those procedural contexts include motions for extension of time to file a notice of appeal after the deadline where a finding of excusable neglect is required under both Bankruptcy Rule 8001(d)(1) and its analog in the Federal Rules of Appellate Procedure, Appellate Rule 4(a)(5)(A), Fed. R. App. P. 4(a)(5)(A); *United States v. Thompson*, 82 F.3d 700, 702 (6th Cir. 1996) (*Pioneer* applies to decisions on motions under Fed. R. App. P. 4(a)). The Sixth Circuit and the Sixth Circuit Bankruptcy Appellate Panel apply *Pioneer* in this context, as have other appellate courts. Although the relevant deadlines are 30 days under the Federal Rules of Appellate Procedure instead of the 14 days under the Bankruptcy Rules, that distinction is meaningless. The Court finds precedents under both rules equally instructive.

Many cases addressing excusable neglect in the context of late notices of appeal are unpublished decisions, presumably because the outcomes depend so heavily on specific facts. Also, lawyer guidance through published decisions is less helpful in this area because these are not the type of situations where a lawyer consults case law in advance of acting to guide conduct and client advice. Nevertheless, certain clear guiding principles emerge from this body of case law helpful to

judges evaluating such situations after the fact. That many of the cases from which they emerge are unpublished thus does not lessen their importance to the decision on the Motion from this Court's perspective.

Applying *Pioneer* to requests for extension of time to file a notice of appeal on the basis of excusable neglect is a two-step analysis.

First, the court must decide whether the failure to file timely was the result of "neglect." "The ordinary meaning of `neglect' is `to give little attention or respect' to a matter, or, closer to the point for our purposes, `to leave undone or unattended to *esp[ecially] through carelessness.*'" *Pioneer*, 507 U.S. at 388 (quoting Webster's Ninth New Collegiate Dictionary 791(1983) (emphasis in original)).

Then, if the court finds "neglect," it must decide whether the neglect was "excusable" based on relevant *Pioneer* factors. *Id.*, at 395. While the Supreme Court set forth an inclusive list of relevant factors in *Pioneer,* it did not give guidance on how to balance them beyond its observation that excusable neglect "is a somewhat elastic concept." *Id.*, at 392. Since then, appellate courts have developed basic principles for balancing the *Pioneer* factors. As noted by the Sixth Circuit in *United States v. Munoz*:

> The Pioneer factors `do not carry equal weight; the excuse given for the late filing must have the greatest import. While [the others] might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry.'

605 F.3d 359, 372 (6th Cir. 2010) (quoting *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000)). Under Appellate Rule 4(a)(5), "the greatest weight is properly assigned to the reason for delay." *JBlanco Ent. v. Soprema Roofing and Waterproofing, Inc.*, Case No. 17-3535, 2017 WL 5634299, at *2 (6th Cir. Nov. 20, 2017) (district court's finding of no excusable neglect for filing late appeal, where counsel drafted notice but secretary did not file it, is affirmed because the trial court "properly assigned the greatest weight to the reason for the delay"); *Proctor v. Northern Lakes Community Mental Health*, 560 F. App'x 453, 459-60 (6th Cir. Jan. 23, 2014) (district court did not abuse its discretion in not combing through each *Pioneer* factor because determination of excusable neglect is elastic and not all factors carry equal weight in each case); *Prizevoits v. Indiana Bell Tel. Co*, 76 F.3d 132, 134 (7th. Cir. 1996).

This is particularly so in Rule 4(a)(5) and Rule 8001(d)(1) cases. Even though there are four *Pioneer* factors, the three factors of length of delay, prejudice to the appellee and good faith almost always favor the tardy would-be appellant. "[D]elay always will be minimal in actual if not relative terms . . . prejudice to the non-movant will often be negligible . . . [a]nd rarely in the decided cases is absence of good faith an issue." *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003) (quoting *Lowry v. McDonnell Douglas Corp.*, 211 F.3d at 463). The Seventh Circuit stated simply in *Prizevoits*, 76 F.3d at 134, that "[w]e do not think it can make a difference that no harm to the appellee has been shown." The reason that the other *Pioneer* factors are discounted in significance and weight in this procedural context derives from the clear and immutable deadlines of the rules of procedure at issue, in contrast to the vague court-created notice of and deadline for filing a proof of claim at issue in *Pioneer.* By their terms, the appellate rules cabin the length of the delay to 21 or 30 days after the appeal deadline, unlike potential lengthy delays under Rule 60(b) or in filing proofs of claim, for example. As a result of the necessarily relatively short delay period, prejudice to the potential appellee and good faith are generally not at issue. *Xuchang Rihetai Human Hair Goods Co., Ltd. v. Hongjun Sun (In re Hongjun Sun)*, 323 B.R. 561, 564-65 (Bankr. E.D.N.Y. 2005). *Cf. In re Jackson*, 585 B.R. 410, 420-21 (B.A.P. 6th Cir. 2018) (in case holding that 14-day time limit imposed by statute conferring appellate jurisdiction on district courts and bankruptcy appellate panels is jurisdictional, court notes that rigid enforcement of the strict and quick appeals deadlines promotes the primary policies behind the Bankruptcy Code). And so it is in this case. Defendant has not disputed Plaintiffs' conclusory assertions that the delay is minimal, no prejudice accrued or will accrue to Defendant from the missed deadline and Plaintiffs have acted in good faith. The Court so finds. The crux of the Motion is whether the Otts have shown neglect and the reason for the delay, including whether it was in their reasonable control.

ANALYSIS

A. Plaintiffs' Reason for Delay

Plaintiffs cloak the reason for the missed deadlines in the COVID-19 pandemic. The following paragraph of the Motion explains their reason for the delay:

> Plaintiffs are represented by two attorneys, Timothy Walerius (Walerius) and Stephen Hartman (Hartman). In March issues regarding the COVID-19 virus were of significant concern. The federal government and the State of Ohio Governor issued stay at home orders and requested that individuals self-quarantine in anticipation of a pandemic. Walerius is at high risk regarding the virus. His wife is a nurse who works at a local hospital. This has created significant stress in managing homelife and work. Hartman had several of their attorneys present in family court when a local attorney who was present with a flu like symptoms. The attorney passed away just a few days later from COVID-19.[5] The risk to health and safety became paramount to both Walerius and at Hartman's firm. Also, as a result of this unprecedented situation State Courts stayed all time deadlines for cases in the court system. Hartman's practice in Federal Court had all of his cases put on hold with little or no action taking place. Walerius for all practical purposes shut his practice down and closed his practice and Hartman's firm closed completely. Both offices remain in the same situation as of the time of this motion. *Both Walerius and Hartman believed that the time to file a Notice of Appeal had been tolled or stayed until courts reopened and resumed normal business.* Plaintiffs contacted Walerius and expressed an interest in ordering a transcript. On or about April 21 Walerius, contacted the court bailiff and inquired how to order a transcript. In the course of the conversation Walerius inquired how the bailiff liked the slow time in the courthouse. She made a statement to the effect that it was not slow it was business as usual. This prompted Walerius to begin searching whether the time for filing an Appeal had in fact been tolled or stayed. Upon learning that it had not he immediately researched and drafted this Motion For Extension of Time to file a Notice of Appeal.

[Doc. # 50, pp. 5-6]. (Emphasis added) (footnote 5 inserted by the Court). The Court accepts the facts stated as true, including the timing and substance of the conversation with court staff, which is accurate. The Court appreciates the straightforward candor of counsel. Although disputing the proper conclusion from these facts, Defendant does not dispute them either. As a result, the Court does not need to hold a hearing or take evidence on the Motion. *Nicholson v. City of Warren*, 467 F.3d 525, 527 (6th Cir. 2006) (no hearing necessary to decide a discretionary motion under Fed. R. App. P. 4(a)(5) where the facts asserted by appellant were presumed to be true); *United States v. Douglas,* 746 F. App'x. 465, 468 (6th Cir. August 17, 2018) (same).

B. Status of Courts' and State of Ohio's Operations

Plaintiffs' reason for delay raises the status of various courts' operations, most directly this one, from March 30 through April 13, 2020, as the time period relevant to the Motion. The matters that serve as the background for the incorrect assumption made by Plaintiffs' lawyers that deadlines in bankruptcy court were somehow stayed throughout some undefined period of time are of public record.

1. Bankruptcy Court

Both of Plaintiffs' lawyers are generally known to this Court as experienced litigators. Although neither regularly practices in this bankruptcy court, both lawyers are registered users of the court's CM/ECF electronic filing, service and noticing system, as they must be to file and receive documents. LBR 5005-4. There is a link to access directly the CM/ECF filing system on the front page of the court's website. UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO, https://www.ohnb.uscourts.gov.

Local Bankruptcy Rule 5005-4 adopts electronic filing, service and noticing[6] protocols as set forth in this Court's separate Electronic Case Filing (ECF) Administrative Procedures Manual[7] ("APM"), which is available on the court's website as the first item under the tab called ECF and Case Info. Section I.A.2. on page 1 of the APM states: "Mandatory ECF. Unless otherwise ordered by the Court, ECF is mandatory for all attorneys . . ." APM, at p.1 (emphasis in original). In turn, under the heading II. ELECTRONIC FILING AND SERVICE FOF DOCUMENTS/A. Filing/1. Requirements, the APM states that " [a]ll petitions, motions, memoranda of law, or other pleadings and documents to be filed with the Court in connection with a case assigned to the ECF system shall be electronically filed on the system." APM, § II.A.1. (emphasis in original). That

electronic filing requirement includes notices of appeal. *Cf.* APM, § III.A. There are limited exceptions to the requirement of electronic filing of documents by registered users of the system. *Id.* None of them apply here, although if counsels' equipment was temporarily inoperable a paper filing would have been permitted and facilitated. APM, § II.C.2. There is, however, no suggestion that either of Plaintiffs' lawyers' basic computer equipment, e-mail, software systems and internet connections were inoperable or unavailable to them for use from March 30 to April 13. *See* APM, § I.B.2., p. 4. Except for the trial exhibits submitted manually to the court, [*see* Doc. # 35, § II.3, p. 2], all filings in this adversary proceeding were electronic.

This bankruptcy court, as all courts did, took specific steps to address the impact of the COVID-19 pandemic on its operations and notified registered CM/ECF Users and the general public about them. All in all, external operational changes were minimal, indeed irrelevant insofar as the filing of a notice of appeal and the Motion in this adversary proceeding. Bankruptcy court business in this district carried on largely unabated. The exceptions were the individual continuance of trials and other evidentiary proceedings and the transition of all other matters to telephonic hearings, which have nothing to do with electronically filing a notice of appeal. Filings and processing of filings continued and have continued, with the only external document filing impacts to unrepresented persons. At no time from March 30 to April 13 did the court's CM/ECF filing system shut down or become inoperable. Rather, from March 30 to April 13 the court and clerk's office staff were doing their jobs and fully available to answer telephone inquiries. When Walerius eventually called the bankruptcy court clerk's office, the phone was answered and his questions were addressed. All registered CM/ECF Users, including both Plaintiffs' lawyers and Defendant's lawyer, and the general public were notified of the limited changes in external operations that occurred.

Eighteen days before the March 30 judgment was entered in this case, on Thursday March 12, 2020, the Court issued a document titled "NOTICE TO ALL LITIGANTS AND LAWYERS WITH MATTERS IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO." (Emphasis original) ("Notice to All Litigants"). It was sent by blast e-mail on March 12, 2020, to all registered CM/ECF users, including Plaintiffs' lawyers and Defendant's lawyer. It was also posted (and is still posted) as a link on the court's website under News and Announcements at the date 03/12/20 and the document title.[8] When it was posted and through the March 30 to April 13 time period relevant to the Motion, the title and link appeared on the front page of the court's website. The court's complete Notice to All Litigants states as follows:

> The United States Bankruptcy Court for the Northern District of Ohio has evaluated ongoing court operations in light of the state of emergency in the state of Ohio declared by Governor Mike DeWine in Executive Order 2020-01D issued on March 9, 2020. Like all organizations, businesses and individuals, we are trying to balance the developing public health concerns of our employees and the general public against ongoing operational requirements, in our case those of a high-volume trial court.
>
> *Unless and until notified otherwise* in general or by a Judge in a specific matter or set of matters, *we remain open to accept filings* and conduct scheduled hearings and Court appearances. We are nevertheless mindful of the public health concerns raised by the by the COVID-19 disease and the SARS-CoV-2 virus that causes it. Lawyers, their clients and litigants must carefully monitor and evaluate their own health situations for the well-publicized disease symptoms. The Court strongly encourages the filing of requests for continuances in situations of any health concern, also being careful with privacy concerns in making any such request to the Court.
>
> Please do not hesitate to bring any concerns or questions about a particular matter or situation to the attention of appropriate Court staff, including to determine whether a personal appearance is required or another reasonable accommodation and alternative to requesting a continuance might be possible under the circumstances.
>
> March 12, 2020

https://www.ohnb.uscourts.gov/sites/default/files/news-and-announcements/coronavirus-notice-ohnb.pdf (Emphasis added).

Following up on the March 12, 2020, Notice to All Litigants and also before the judgment in this case was entered on March 30, this Court entered on March 23, 2020, two general orders to address its operating circumstances in light of the COVID-19 pandemic. General Order No. 20-02[9] and General Order No. 20-03.[10] They were superseded on May 4, 2020, to extend their duration, Amended General Order No. 20-02[11] and Amended General Order No. 20-03,[12] but the two initial

General Order Nos. 20-02 and 20-03 were in effect at all times relevant to the Motion. When they were entered, the link to them appeared at the top of the front page of the court's website in a yellow box setting it apart from other content under the heading Court Offices Closed to the Public Until Further Notice in red large font letters. When General Order No. 20-02 and General Order No. 20-03 were entered on March 23, 2020, and at all times relevant to the Motion, they also appeared on the front page of the court website under the News and Announcements heading. There was also (and still is) a separate link to each of them under the News and Announcement window[13] on the court's website. Those general orders are also listed on the Court's General Orders window.[14]

In addition to conspicuously posting General Order No. 20-02 and General Order No. 20-03 on the court's website, on March 23, 2020, the Clerk sent a blast e-mail to all registered CM/ECF users with a link to each of the orders attached. General Order No. 20-03 was also supplemented with a separate public notice from the Clerk, titled PUBLIC NOTICE OF TEMPORARY FILING PROCEDURES AND CLOSING OF DIVISIONAL OFFICES TO THE GENERAL PUBLIC. (emphasis original) ("Filing Procedures Notice"). The first two sentences of the Filing Procedures Notice, as follows, contain a link to the General Order No. 20-03 and are relevant to the Motion:

> Pursuant to General Order 20-03 Temporary Filing Procedures, the courthouses and intake desks are CLOSED and no face-to-face assistance is available until further notice.
>
> Registered Case Management/Electronic Case Filing (CM/ECF) users must continue to file electronically.

https://www.ohnb.uscourts.gov/news/public-notice-temporary-filing-procedures-and-closing-divisional-offices-general-public. It was issued via blast e-mail to registered CM/ECF users on March 23, 2020, and posted (and still is) on the court's website under News and Announcements. When posted, it appeared on the front page of the News and Announcements column. It remains posted under the News and Announcements window.

The court's General Order No. 20-02 is titled "Temporary Modification of Requirement to Obtain Original Signatures From Persons for Electronic Filings." Notwithstanding mandatory electronic filing for lawyers, some documents filed with the court still require contemporaneous original signatures, mostly by individual debtors. General Order No. 20-02 modified those procedures, only, in recognition that lawyers would have a hard time physically meeting with their clients. It modifies only one deadline, that being this court's requirement in its APM that an original signature be obtained on a debtor's Signature Declaration Form required at case opening. Instead of requiring the document with the original signature to be filed together with a debtor's bankruptcy petition, the court permitted counsel to file the document with a debtor's original signature up to 21 days after commencement of the case. This change allowed time for the "wet signature" process and requirement to be implemented through first class mail instead of by in-person meeting. This General Order No. 20-02 does not apply and is irrelevant to a notice of appeal or motion for extension of time to file a notice of appeal because no represented party signature, original or otherwise, is required on either filing.

The court's General Order No. 20-03 is titled "Temporary Filing Procedures." It supplements General Order No. 20-02. It notifies practitioners, litigants and the public that all divisional offices, including intake desks, are closed to the general public and that no document filings or fee payments will be accepted over-the-counter. It sets forth alternative filing and payment procedures for persons not represented by counsel and those permitted or required under the APM to file documents manually. Of significance to the Motion, this court's General Order No. 20-03 states the following:

> • "While Clerk's Office personnel cannot provide legal advice, staff will remain available by telephone from 9:00 a.m. to 4:00 p.m. to answer questions about filing and other court procedures." (General Order No. 20-03, ¶ 1, p. 1).
>
> • "Registered CM/ECF users must continue to use the CM/ECF electronic filing system to file documents and Pay.gov to make fee payments." (General Order No. 20-03, ¶ 2, p. 2).

As directed in both general orders, the Clerk immediately provided notice of them and "of the closing of court facilities and the intake desks." As explained above, both were posted prominently on the home page of the court website during the time period relevant to the Motion. In addition, the Clerk directly notified registered CM/ECF users, including both of Plaintiffs' lawyers and Defendant's lawyer, of the procedural orders by blast e-mail.

2. Federal District Court

The Motion states that one of Plaintiffs' lawyers' "practice in Federal Court had all of his cases put on hold with little or no action taking place." [Doc. # 50, p.6]. The court presumes the reference to Federal Court is to the United States District Court for the Northern District of Ohio, Western Division, in Toledo, ("district court"), of which this court is a unit, 28 U.S.C. § 151, and with which this court shares occupancy of a courthouse. Like the bankruptcy court, the district court took specific steps to address the impact of the COVID-19 pandemic on its operations and to tell litigants, lawyers and the general public about them. Suffice to say that because of the district court's need to conduct jury trials, a need the bankruptcy court does not share except in the rarest of circumstances, its operational restrictions were both more difficult and more substantial. Nevertheless, the district court's operational changes and limitations had little to do with operations in this court, including specifically ongoing filings, which continued unabated in both courts. Ultimately, the impact of the district court's COVID-19 operational limitations on this bankruptcy court has been limited to physical closure to the public of co-occupied court buildings, including the courthouse in Toledo, which occurred on March 23, 2020.

Specifically, the district court entered two general orders that affected its operations during the March 30 to April 13 period relevant to the Motion. On March 16, 2020, the district court entered its General Order No. 2020-05 titled "Coronavirus (COVID-19) Public Emergency" and dated March 11, 2020. It extended through May 1, 2020. When it was issued, blast notice of it was given by the district court Clerk and it was posted in a conspicuous spot on the front page of the district court's public website. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, https://www.ohnd.uscourts.gov. It is no longer available on the district court's website because it was later superseded. A copy is attached as Appendix 1.

The district court's General Order No. 20-05 order postpones all jury trials and various other criminal proceedings, grand jury sessions, and mass gatherings "other than court proceedings." It provides that judges may conduct criminal pretrial proceedings and civil pretrial proceedings by video or telephone, notes that intake desks will remain open for filings and, significantly: "Electronic filings may still be made through the CM/ECF system." N.D. Ohio District Court General Order No. 20-05, ¶ 7. More importantly with respect to Plaintiffs' Attorney Hartman's Statement in the Motion, "[t]he public is encouraged to continue utilizing Court services while following all applicable public health guidelines." *Id.* Nothing in district court General Order No. 20-05 has anything to do with or says anything about bankruptcy court operations. Moreover, district court General Order No. 20-05 says nothing about staying filing deadlines in that or any other court, including bankruptcy court.

By March 23, 2020, the week before the judgment was entered on March 30, 2020, the district court entered its Amended General Order No. 20-05, to account for Ohio Governor Mike DeWine's Stay at Home Order. District Court Amended General Order No. 20-05 directly impacted bankruptcy court operations because it closed all courthouses in the Northern District of Ohio to the general public, including the courthouse here in Toledo in which both courts operate. Otherwise, its provisions had nothing to do with and say nothing about bankruptcy court operations. Of relevance, however, it continued to note that "[E]lectronic filings may still be made through the CM/ECF system," while setting up alternative filing options for those without access to CM/ECF. District court Amended General Order No. 20-05 addresses only one deadline, that being a criminal defendant's right to a speedy trial. The district court gave immediate blast e-mail notice of Amended General Order No. 20-05 to all practitioners. It, too, appeared in a conspicuous place on the front page of the district court's public website. It is no longer available on the district court's website because it was later superseded. A copy is attached as Appendix 2. District court Amended General Order No. 20-05 extended this period through May 1, 2020. It was the district court general order in effect during the March 30 to April 13 time period relevant to the Motion.

The district court also entered General Order No. 20-06 on March 30, 2020, the date of the judgment in this case. Its sole purpose was to address Congress' authorization in The CARES Act for district court use of video and telephone proceedings in certain criminal proceedings. When it was issued, the district court Clerk gave immediate blast notice of General Order No. 20-06 and it was posted in a conspicuous spot on the front page of the district court's public website, where it remains. District Court General Order No. 20-06 has nothing to do with and does not address bankruptcy court filing deadlines, practices or operations.

Apart from any communications issued in specific matters, about which this court has no knowledge or information, district court General Order No. 20-05, Amended General Order No. 20-05 and General Order No. 20-06 are the only general district-wide communications about operations in light of the COVID-19 pandemic that occurred before or were effective during the March 30 to April 13 time period relevant to the Motion.

3. State Court

The Motion states that "as a result of this unprecedented situation State Courts stayed all time deadlines for cases in the court system." [Doc. # 50, p. 6]. The court presumes the reference to State Courts is to the state courts of Ohio.

On March 27, 2020, the Supreme Court of Ohio issued the Administrative Actions order to which the Motion refers. 03/27/2020 Administrative Actions, XXXX-XXXX, Ohio Supreme Court ("Administrative Actions Order"). As a member of the Ohio Bar, this judge received it via an e-mail from Chief Justice Maureen O'Connor and presumes that all other members of the Ohio Bar, including Plaintiffs' lawyers and Defendant's lawyer, did as well. It appears on the Supreme Court of Ohio's website under the tab Coronavirus Resources and the heading Judicial and Administrative Orders. It is titled "In re Tolling of Time Requirements Imposed by Rules Promulgated by the Supreme Court and Use of Technology."[15] There is also a list of Tolling Order/Frequently Asked Questions[16] ("FAQ") and a separate analysis prepared by the Supreme Court of Ohio dated April 2, 2020, called "ASSESSING IMPACT of Tolling Legislation and Supreme Court Order upon Specific Time Requirements."[17] ("Assessing Impact document") (Emphasis in original). The purpose of this document is to provide lawyers with guidance "for determining the precise impact of the tolling provisions of AM. Sub. H.B. 197 and the Supreme Court's March 27, 2020, order upon specific situations." Both the Ohio Legislature's bill and the Supreme Court's Administrative Actions Order were retroactive to March 9, 2020. Both expire on the earlier of July 30, 2020, or the date Governor's Mike DeWine's Executive Order 2020-01D (the Stay at Home Order) expires. Both were in effect during the March 30 to April 13, 2020, time period relevant to the Motion.

The sixth introductory whereas clause of the Administrative Actions Order states "it is necessary for the Court to establish a temporary measure promoting uniformity and continuity amongst the courts of Ohio . . ." It applies to and tolls only various Ohio rules of procedure and says nothing about any federal courts or rules of procedure. As shown by the accompanying FAQ document, the Ohio legislature's "Am. Sub. H.B. 197 `tolls only *statutorily* established' time requirements," (emphasis in original), and "applies to any civil, criminal, civil or administrative time limitations imposed by the Ohio Revised Code or the Ohio Administrative Code." FAQ at Answers to Questions 2 and 3. Both the FAQ and April 2 Assessing Impact document refer to "Federal Laws and Regulations" in directing a "local court to determine whether there are applicable federal laws or regulations that impact compliance with a time requirement." Step 4 of the Assessing Impact document's decision making tree likewise include a final directive to courts to consider whether "[f]ederal law or regulations may require courts to proceed with a case, or, conversely, may prohibit proceedings with the case." But nothing in any of the Ohio Supreme Court's three tolling documents—the Administrative Actions Order, the FAQ or the Assessing Impact document — purports to affect any federal law, regulation, rule of procedure or deadline.

4. State of Ohio

The Motion states in its statement of the reason for delay that "the federal government and the Ohio State Governor issued stay at home orders and requested that individuals self-quarantine in anticipation of a pandemic." [Doc. # 50, p. 5]. Although the President of the United States declared a public health emergency and issued coronavirus guidelines, as did the Federal Centers for Disease Control, the court is not aware of any "stay at home" order issued by the federal government. As referenced in this court's General Order No. 20-03, Ohio Governor Mike DeWine declared a public health emergency by Executive Order 2020-01D[18] issued on March 14, 2020, and the Ohio Department of Health issued its Director's Stay at Home Order[19] effective March 23, 2020, which was later amended[20] and extended on April 2, 2020, to May 1, 2020, past its April 6, 2020, rescission date, to be in effect through the March 30 through April 13 time period relevant to the Motion. The court presumes the Ohio Department of Health Stay at Home and Amended Stay at Home Orders are the orders to which the Motion refers. They remain available, as is Governor DeWine's public health emergency Executive Order 2020-01D, on the Ohio Department of Health Coronavirus (COVID-19) website. https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/public-health-orders/public-health-orders. As the Motion states, subject to certain exceptions "all individuals currently living within the State of Ohio are ordered to stay home or at their place of residence except as allowed in this Order." Of note, however, "legal services" are within the definition of Essential Businesses and Operations as Essential Activities which persons were permitted to leave their homes to perform. Director's Stay at Home Order, ¶ 12.u., p. 7. Moreover, the Stay at Home Order "does not apply to the United States government." *Id.* ¶ 10,

C. Determination of Neglect

Under the two-step analysis established in *Pioneer,* the first step in evaluating a claim of excusable neglect is to determine whether the failure to act was the product of "neglect." *In re Bayer*, 527 B.R. 202, 211 (Bankr. E.D. Pa. 2015), *aff'd* 558 B.R. 722 (E.D. Pa. 2016).

When a lawyer misses a deadline, it might seem obvious that it resulted from "neglect" as one conventionally views that concept. But as the Supreme Court analyzed in *Pioneer,* there is a range of possible explanations for a failure to comply with a filing deadline, from being prevented from doing so by forces beyond a party's control to cases "where a party may choose to miss a deadline for a very good reason" due to inadvertence, miscalculation or negligence in between. *Pioneer*, 507 U.S. at 388. Although they do not explicitly so state in their explanation of what happened, the court can reasonably infer and so finds that Walerius and Hartman both had notice and were aware of entry of the judgment and that both knew the deadline to appeal this Court's judgment against the Otts was 14 days and not, for example, 30 days as under Fed. R. App. P. 4(a)(1). Quite simply, there would have been no basis to file the Motion if they did not know the 14-day deadlines in the first place.

Rather, the essence of the explanation for missing the deadlines is that "[b]oth Walerius and Hartman believed that the time to file a Notice of Appeal had been tolled or stayed until the courts reopened and resumed normal business." [Doc. # 50, p. 6]. This statement, which is based on a fundamentally incorrect assumption, shows that they made a decision not to act in the 14 days after the judgment, either to file a notice of appeal or to seek an extension to do so, because they considered it and concluded they did not have to act. There is no indication that they could not have or were prevented from filing the notice of appeal, as the very filing of the Motion shows. Instead, the background of COVID-19 against which the deadline was missed forms the basis for their incorrect conclusion that the deadlines were tolled.

Where a decision not to act is made, there is no neglect, and the Court so finds here. *Wilson v. Moss (In re Wilson),* C/A No. 10-01218-HB, Adv. Pro. No. 14-80054-HB, 2015 WL 3528226, at *2 (Bankr. D.S.C. June 3, 2015); *see In re Benefit Corner, LLC,* Case No. 16-11027, 2019 WL 7498664, at *6 (Bankr. M.D.N.C. Dec. 31, 2019); *Brodie v. Gloucester Twp.*, 531 F. App'x. 234 (3d Cir. Jul. 19, 2013); *see Lee v. Toyota Motor Sales, U.S.A., Inc.*, No. 96-2337, 1997 WL 256976, at **2-3 (E.D. Pa. May 16, 1997) (conscious decision not to respond to motion based on interpretation of court handbook in contravention of local rules not excusable neglect under Rule 60(b)).

This is not a situation where, as *Pioneer* defines "neglect," 507 U.S. at 388 (quoting Webster's Ninth New Collegiate Dictionary 791 (1983)), Walerius and Hartman gave little or no attention or respect to the matter or left it undone or unattended to through carelessness. As the bankruptcy court in *In re Bayer* observed, "whether Gigliotti's [counsel's] decision or his reasoning coming to that decision [not to file a notice of appeal] was reasonable or unreasonable, correct or incorrect, competent or negligent, consistent or inconsistent with his obligations . . . is beside the point." 527 B.R. at 211.

D. Determination of Excusable Neglect

In the absence of a finding of "neglect" the court need not address whether it was "excusable" to miss the 14-day deadlines for filing a notice of appeal or to request an extension of time to do so. The Court will nevertheless do so for completeness. Also, some courts and cases are fuzzy on whether they have engaged specifically in a two-step analysis. Rather, they just find excusable neglect or no excusable neglect.

As explained above, and in harmony with *Munoz* and other Sixth Circuit precedent, the focus in the procedural context of an extension of time to file a late appeal is on the reason for delay and whether it was within the control of movant as outweighing the other *Pioneer* considerations. *Community. Fin. Servs. Bank v. Edwards (In re Edwards),* No. 17-8028, 2018 WL 2717237, at * 6 (B.A.P. 6th Cir. 2018). The case that Plaintiffs rely upon, *Bli Farms v. Greenstone Farm Credit Servs. (In re Bli Farms)*, 294 B.R. 703 (Bankr. E.D. Mich. 2003), did not ascribe more weight to the reason for delay than to the other three *Pioneer* factors, notwithstanding that the bankruptcy court found that "the filing was within counsel's control and could have been accomplished timely" even given counsel's busy schedule and preoccupation with other matters. As a result, the bankruptcy court found excusable neglect for failing to file a notice of appeal within 10 days and granted the plaintiffs' motion to extend the deadline to do so under former Rule 8002(c)(2). The Court does not find *In re Bli Farms* persuasive. The bankruptcy court's interpretation in *In re Bli Farms* of the *Pioneer* factors does not hold up under subsequent weighing

by the Sixth Circuit and the Sixth Circuit Bankruptcy Appellate Panel of the *Pioneer* factors in analyzing excusable neglect determinations under Bankruptcy Rule 8002(d)(1) and Appellate Rule 4(a)(5).

While the concept of excusable neglect is an elastic, equitable determination under *Pioneer,* as Plaintiffs emphasize, the Sixth Circuit continues post-*Pioneer* to hold it to be "a strict standard that is met only in extraordinary cases." *Nicholson*, 467 F.3d at 526. Moreover, as the Supreme Court mused in dicta in *Pioneer,* the Sixth Circuit continues to emphasize that ignorance of or "mistakes in construing the rules" for determining the time for an appeal "do not usually constitute excusable neglect." *Id.* (citing *Pioneer*, 507 U.S. at 392). And so it is here.

The reason that Plaintiffs missed the 14-day filing deadlines is two lawyers' wrong legal conclusion that the deadlines in Bankruptcy Rule 8002(a)(1) and (d)(1)(A) had been tolled because of the COVID-19 pandemic for some indefinite period of time "until courts reopened and resumed normal business." The Court acknowledges the descriptive background of the personal stress of the COVID-19 impact on both lawyers and the closure of their law offices, but finds the situation common to the many other local practitioners in this court who have continued to file documents and meet deadlines through the pandemic. There is no indication that they were prevented by any of it from one or both of them undertaking, between March 30 and April 13, the simple of act of preparing a Notice of Appeal form or motion for extension of time and electronically filing it with this court. In *Pioneer* the Supreme Court explicitly gave little weight to upheaval in counsel's law practice as a cognizable basis for missing the proof of claim filing deadline. *Pioneer*, 507 U.S. at 398.

The referenced disquiet of the family court appearance and ultimate death on March 18 of a local lawyer who was, it turns out, also a debtor with ongoing matters set to proceed in this court, occurred well before the March 30 electronic entry and service of the final judgment in this adversary proceeding. Thankfully there is no indication in Plaintiffs' explanation of what happened of sudden or debilitating illness occurring prior to or through April 13 of either lawyer or their loved ones. But there is also no indication of a lack of basic computer and internet access by either or both lawyers notwithstanding that they were no longer working from their law offices. Indeed, under conditions described as ongoing as of the April 24 filing date of the Motion, a thoroughly researched and thoughtfully written Motion and supporting brief, along with the prepared 2-page Notice of Appeal and Statement of Election form, [Doc. # 50, App'x. A], were readily electronically filed with this Court, just as the Court's judgment was readily electronically issued and served on March 30. *See Isert v. Ford Motor Co.*, 461 F.3d 756, 758 (6th Cir. 2006) ("would-be appellants must complete two modest tasks" to take an appeal: they must give notice of it and they must give notice in time); *In re Nat'l Century Enterprises, Inc.*, Case No. 2:06-cv-883, 2007 WL 912216, at *5-6 (S.D. Ohio March 23, 2007) (quoting bankruptcy court's finding about the simple nature and contents of a notice of appeal in affirming decision that there was no excusable neglect in missed appeal deadline). The only identified and known telephone contact with court staff about the appeal was promptly and routinely engaged by court staff but also did not occur until April 21.

The Court has set forth in detail the ongoing status of court operations and formal communication of them to lawyers and the public in order to evaluate whether there were rules, general orders or communications that were misleading to counsel. This evaluation is important because of the Supreme Court's focus in *Pioneer* on the misleading nature of the bankruptcy court's own notice as the foundation of excusable neglect beyond the upheaval in counsel's office that was afforded little weight in its excusable neglect analysis.

The recitation of court operational changes and public notifications of them shows no basis in any rule, general order or communication from, most importantly, this Court, but also from the federal district court, the Ohio Supreme Court or the State of Ohio, all of which are raised by counsel, from which any assumption could reasonably be drawn under the circumstances that (1) jurisdictional or any other deadlines under the Bankruptcy Rules or Bankruptcy Code were indefinitely tolled or (2) this court was ever shut-down for routine and ongoing acceptance and processing of electronic filings. As the Court's recitation demonstrates, bankruptcy court operational changes as a result of the pandemic have been limited. Except for delaying trials and other evidentiary hearings and the closure of court buildings to the general public, thus impacting old-fashioned over-the-counter filings, bankruptcy court business has continued unabated, as it must, even with practitioners and court staff working from home.

This Court's limited COVID-19 operational changes did not affect any aspect of the electronic filing process as involved in a lawyer filing a notice of appeal. Its CM/ECF electronic filing system has never been out of commission during the COVID-19 pandemic and specifically not between March 30 and April 13. The court's public communications and general orders, of which both lawyers were notified by e-mail as registered CM/ECF users and which were also publicly and conspicuously posted on the court's website, instead emphasized that registered CM/ECF users were to continue filing documents

electronically and to call court staff if they had questions. That started with this Court's March 12 Notice to All Litigants. It is quoted in full above because it set the tone from the beginning of the pandemic, with the statement that "[u]nless and until notified otherwise in general or by a Judge in a specific matter or set of matters, we remain open to accept filings and conduct scheduled hearings." As lawyers with a significant pending matter in bankruptcy court in which a decision was awaited, this Notice should have been of singular importance. This message and tone continued with the bankruptcy court's two General Order Nos. 20-02 and 20-03 entered by the Court on March 23.

Attorney Hartman refers to the status of federal district court operations as a basis for his assumption that Bankruptcy Rule deadlines were tolled. The only impact on bankruptcy court of the federal district court's general orders and communications, effective up to and during the March 30 to April 13 time period at issue in the Motion, was the closure of the courthouse to the general public with Amended General Order No. 20-05 entered on March 23. While in-person conduct of proceedings in federal district court stopped effective March 16, 2020, a much more daunting problem there than in bankruptcy court because of the impact on jury trials and criminal matters generally, apart from building closures, nothing in the federal district court's relevant general orders or communications affect or purported to affect bankruptcy court operations, filings or deadlines. There is no ambiguity in any of them about their applicability. Moreover, the tone and directives of the district court's general orders and public communication also emphasized the ongoing availability and expectation that electronic filings continue unabated, as did this bankruptcy court's general orders and public communications.

As also referenced in counsels' explanation for assuming the appeal deadline was tolled by the pandemic, the Ohio Supreme Court entered on March 27, retroactive to March 9, an Administrative Actions Order, complementing certain state legislation, that tolled deadlines under various Ohio rules of procedure for a defined period. Chief Justice Maureen O'Connor circulated the Administrative Actions Order to all lawyers licensed to practice in this state. There is nothing in the Administrative Actions Order, Chief Justice O'Connor's transmission of it or the referenced Ohio legislation about tolling federal rule or statutory deadlines generally or bankruptcy rule or Bankruptcy Code deadlines specifically. Nor could they. There is no ambiguity in these Ohio state court sources about their applicability. The noticeable contrasting absence of any similar order or communication tolling deadlines from this or the federal district court is telling. And unlike the Ohio Supreme Court, this Court cannot find the authority to do so generally in either the Bankruptcy Rules, the Bankruptcy Code or other federal rules or statutes.

The Stay at Home directives and orders of Ohio Governor Mike DeWine and the Ohio Department of Health referenced by counsel, first entered and effective March 23 and ultimately continuing past April 13, unquestionably drove the responses of the referenced courts, litigants and practitioners to the COVID-19 pandemic. That includes closure of counsels' law offices and court buildings to the general public. Except for the Ohio Supreme Court's tolling Administrative Actions Order dated March 27, 2020, March 23 was also the fulcrum date around which court operational actions and changes pivoted. That was, however, a full week before the March 30 electronic entry of the judgment against Plaintiffs, the very fact of which should have been revelatory to counsel of this Court's ongoing operations and expectations notwithstanding the pandemic. Explicitly, the Director's Stay at Home order "does not apply to the United States government."

Counsels' explanation of the reason for their delay coalesces around two problems that neither the Supreme Court in *Pioneer* nor other courts generally consider to be excusable neglect: ignorance of or mistakes construing rules and lawyer law office upheaval. *See* Deym v. Von Fragstein, 127 F.3d 1102 (Table) (6th Cir. Oct. 16, 1997) (majority reverses district court decision allowing late notice of appeal under Rule 4(a)(5) where a new law clerk in counsel's office calculated the appeal time from the wrong order and counsel had suffered "loss of a long-term paralegal assistant, illness of an entrusted associate, and an extraordinary personal workload"). The fundamental logic behind these outcomes is that lawyers are presumed to know the bankruptcy and local rules and requirements of practice, and are responsible for ascertaining that all who work on a file are also aware of them, especially when filing deadlines are involved. *See* Auto Specialties Manuf. Co. v. Sachs (In re Auto Specialties Manuf. Co.), 133 B.R. 384, 392 (Bankr. W.D. Mich. 1991) (quoting In re Earl Roggenbuck Farms, Inc., 51 B.R. 913, 920 (Bankr. E.D. Mich 1985)).

Sixth Circuit and Sixth Circuit Bankruptcy Appellate Panel cases finding that misunderstanding or misreading of rules, orders and statues do not make neglect excusable include: *In re Mayville Feed & Grain, Inc.*, 996 F.2d 1215 (Table) (6th Cir. June 17, 1993) (party has independent duty to keep informed of case status); Duncan v. Washington, 25 F.3d 1047 (Table) (6th Cir. 1994) (per curiam) (no reasonable justification for lawyer's failure to ascertain whether client wished to pursue and appeal and "misunderstanding of the rule in this case was not excusable"); HLM II, Inc. v. Ginley (In re HML II, Inc.), 234 B.R. 67 (B.A.P. 6th Cir. 1999) ("an unintentional oversight occasioned by its attorney's unfamiliarity with bankruptcy

procedure" did not excused missed appeal deadline because, after *Pioneer,* misreading a rule or statute does not meet that standard); *Nicholson*, 467 F.3d at 527 (citing *Pioneer,* pro se party's uncertainty about whether appeal period was 30 days does not excuse failure to file timely notice of appeal under Rule 4(a)(5)); *Douglas v. Swing*, 482 F. App'x. 988, 989 (6th Cir. October 12, 2012) (under Rule 4(a)(5), miscalculation of the filing deadline did not constitute either good cause or excusable neglect for a late appeal, the latter being "a strict standard that will be found only in extraordinary cases"); *In re Edwards,* Case No. 17-8028, 2018 WL 2717237 (B.A.P. 6th Cir. June 5, 2018), *aff'd* 748 F. App'x. 695 (6th Cir. January 15, 2019) (quoting *Nicolson v. Warren,* "[i]gnorance of or `mistakes in construing the rules,'" even by those without counsel, is not necessarily excusable); *Proctor*, 560 F. App'x. at 460 (pro se party's ignorance of the rules and inability to pay filing fee are not excusable neglect under rule 4(a)(5)). *Cf. McCurry ex rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 595 (6th Cir. 2002) (interpreting Rule 60(b)(1), "an attorney's inaction or strategic error based on a misreading of applicable law cannot be deemed excusable neglect"'). Generally, cases from other courts of appeal are not to the contrary on this point.

Additionally, Sixth Circuit and Sixth Circuit Bankruptcy Appellate Panel cases finding that law practice upheaval generally does not amount to excusable include: *In re Hess*, 209 B.R. 79 (B.A.P. 6th Cir. 1997) (delay of mail, unavailability of clients and "other issues associated with trying to run a practice of law" do not excuse missed appeal deadline); *Schmidt v. Boggs (In re Boggs)*, 246 B.R. 265, 268 (B.A.P. 6th Cir. 2000) (that person in law office responsible for mail was seriously ill does not excuse missed appeal deadline because office problems are not sufficient cause for the failure); *JBlanco Enterprises,* No. 17-3535, 2017 WL 5634299, at *2 (6th Cir. 2017) (under Rule 4(a)(5), secretary's failure to file notice of appeal prepared by counsel is not excusable neglect). *But see Allied Domecq Retailing USA v. Schultz (In re Schultz)*, 254 B.R. 149, 154 (B.A.P. 6th Cir. 2000) (distinguishing "law office upheaval" line of cases, court found excusable neglect under extraordinary circumstances in missing 10-day appeal deadline where debtor's spouse became suddenly seriously ill, was hospitalized and counsel was her sole caregiver). Generally, cases from other courts of appeal are not to the contrary on this point.

Based on the applicable facts and case law, the Court finds that Plaintiffs have not shown excusable neglect justifying an extension of the time to appeal under Bankruptcy Rule 8002(d)(1). Counsel both made the wrong assumption that the filing deadlines for the notice of appeal or a timely motion for an extension of time to appeal were indefinitely tolled by the COVID-19 pandemic. As the detailed recitation of court and other public responses to the pandemic show, there is no reasonable basis upon which that conclusion could be drawn, either from the limited operational changes that occurred in this Court or from the public and targeted communication of them. To the contrary, the changes made in this Court, specifically adjournment of all evidentiary proceedings and closure of courthouse access to the general public, did not affect the timing or act of electronic filing of a notice of appeal or a motion for extension of time to appeal. This Court's CM/ECF electronic filing system was not impacted by or shut down during the COVID-19 public health emergency. Court staff continued to work unabated throughout the time period at issue and to be available by telephone to answer questions, as occurred. The physical dislocation of counsel and the stress they experienced from the circumstances they describe are understandable but not unique among court staff and all practitioners who have carried on throughout in this high volume trial court. The described potential exposure of one of the two lawyers in another court to a debtor in this Court (also a lawyer) occurred weeks before the judgment in this case was electronically entered by this Court on March 30, 2020. Nor have the uncontested stress and physical dislocation as the background against which the missed deadline occurred, while dramatic, been shown to have impacted the simple task of electronically filing the notice of appeal or a motion for extension by April 13, 2020. The Court finds that both ascertaining the applicable deadlines and that there was no tolling of them, and the basic act of electronically filing a notice of appeal document were always within the reasonable control of one or both sets of Plaintiffs' lawyers to accomplish. There was no neglect, but an incorrect legal and factual conclusion ungrounded in the rules or operational practice. To the extent there was neglect, it was not excusable. This is not a close case in which the other *Pioneer* factors tip the balance in Plaintiffs' favor against the weight of the reason for delay and whether it was within Plaintiffs' reasonable control to avoid it.

CONCLUSION

For the reasons and based on the authorities stated above, Plaintiffs' Motion is not well taken. The Court will enter a separate judgment in accordance with this opinion denying Plaintiffs' Motion to Extend Time to File Notice of Appeal [Doc. # 50].

GENERAL ORDER NO. 2020-05

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO

In Re: ORDER NO. 2020-05 CORONAVIRUS (COVID-19) PUBLIC EMERGENCY

The Governor of the State of Ohio has declared a public health emergency throughout the state in response to the spread of the coronavirus (COVID-19).

The Centers for Disease Control and Prevention and other public health authorities have advised the taking of precautions to reduce the possibility of exposure to the virus and slow the spread of the disease.

NOW, THEREFORE, in order to protect public health, and in order to reduce the size of public gatherings and reduce unnecessary travel, the United States District Court for the Northern District of Ohio hereby issues the following order effective immediately:

1. The following events in the Northern District of Ohio, scheduled to begin before May 1, 2020, are postponed pending further order of the Court:

• All civil jury trials

• Re-entry court proceedings

• Petty Offense (CVB) proceedings

The Court may issue other orders concerning future continuances as necessary and appropriate.

2. Criminal trials will not proceed unless absolutely necessary. The Court is cognizant of the right of criminal defendants to a speedy and public trial under the Sixth Amendment, and the particular application of that right in cases involving defendants who are detained pending trial. Individual judges presiding over criminal proceedings should take such actions consistent with this order as may be lawful and appropriate to ensure the fairness of the proceedings, preserve the rights of the parties, and ensure the health and well-being of all participants.

3. Judges may conduct criminal pretrial proceedings by telephone or video conferencing where practicable.

4. Unless otherwise ordered, judges will conduct civil pretrial proceedings by telephone or video conferencing where practicable.

5. Grand juries will not meet unless absolutely necessary.

6. All mass public gatherings, other than court proceedings, are suspended. This includes, but is not limited to, group tours and visits, moot courts and mock trials, bar group meetings, seminars, and naturalization ceremonies.

7. The Clerk's Office, Pretrial Services & Probation Office, and all other Court services will be open with limited staff on the premises and remaining staff on telework status. Staff in the Clerk's Office will be available by telephone, mail will be received, and intake desks will remain open for filings. Electronic filings may still be made through the CM/ECF system, The public is encouraged to continue utilizing Court services while following all applicable public health guidelines.

8. The Court will vacate or amend this General Order no later than May 1, 2020.

IT IS SO ORDERED.

FOR THE COURT _____ Patricia A. Gaughan Chief Judge

AMENDED GENERAL ORDER NO. 2020-05

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO

In Re: ORDER NO, XXXX-XX-X CORONAVIRUS (COVID-19) PUBLIC EMERGENCY

The President of the United States and the Governor of the State of Ohio have declared a public health emergency in response to the spread of the coronavirus (COVID-19).

The Centers for Disease Control and Prevention and other public health authorities have advised the taking of precautions to reduce the possibility of exposure to the virus and slow the spread of the disease. The Governor of the State of Ohio has additionally issued a "Stay at Home" Order.

NOW, THEREFORE, in order to protect the public health, and in order to reduce the size of public gatherings and reduce unnecessary travel, the United States District Court for the Northern District of Ohio hereby issues the following order effective immediately:

> ALL COURTHOUSES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, SHALL BE CLOSED TO THE PUBLIC UNTIL MAY 1, 2020. ONLY PERSONS HAVING OFFICIAL BUSINESS AUTHORIZED BY THIS GENERAL ORDER OR BY A PRESIDING JUDGE, INCLUDING CREDENTIALED MEDIA, MAY ENTER COURTHOUSE PROPERTY. THIS APPLIES TO ALL DIVISIONAL LOCATIONS.

Akron Toledo John F. Seiberling Federal James M. Ashley and Building & U.S. Courthouse Thomas W.L. Ashley U.S. Courthouse 2 South Main Street 1716 Spielbusch Avenue Akron, OH 44308 Toledo, OH 43604 Cleveland Youngstown Carl B. Stokes U.S. Court House Thomas D. Lambros Federal 801 West Superior Avenue Building & U.S. Courthouse Cleveland, OH 44113 125 Market Street Youngstown, OH 44503 Howard M. Metzenbaum U.S. Courthouse 201 Superior Avenue, East Cleveland, OH 44114

CIVIL CASES:

> 1. No jury trial will be commenced before May 1, 2020. Any trial dates currently scheduled during that period are vacated.
>
> 2. All scheduled civil matters will be conducted by telephone or videoconference unless otherwise canceled by the assigned judge. This applies to motion hearings, case management conferences, pretrial conferences, settlement conferences, and Alternative Dispute Resolution (ADR) proceedings.

CRIMINAL CASES:

Due to the Court's reduced ability to obtain an adequate spectrum of jurors and the effect of the public health recommendations on the availability of counsel and court staff to be present in the courtroom, the time period of the continuances implemented by the General Order will be excluded under Speedy Trial Act, as the Court specifically finds that the ends of justice served by ordering the continuances outweigh the interest of the public and any defendant's right to a speedy trial pursuant to 18 U.S.C. Section 3161(h)(7)(A). Accordingly,

> 1. No jury trial will be commenced before May 1, 2020. Any trial dates currently scheduled during that period are vacated.
>
> 2. Initial appearances, arraignments, and detention hearings will proceed and will be conducted by telephone or videoconference where practicable.
>
> 3. Criminal pretrials with defense counsel and United States attorneys may proceed, but by telephone only.
>
> 4. Criminal sentencings are postponed and will not proceed unless the defendant is in custody and (a) the presiding judge determines that an imposed sentence would be equal to or less than the time in which the defendant has been in pretrial custody; or (b) where the presiding judge determines that there is a liberty interest, public safety, or other case-specific compelling reason that makes an immediate sentencing necessary.

5. Change of plea hearings will not proceed. To the extent possible and with the agreement of the defendant, after filing a notice to enter an open guilty plea or plea agreement signed by the defendant and/or defense counsel, the taking of the plea of guilty and the sentencing shall be consolidated for a date after the presentence report has been prepared.

6. AN grand jury proceedings are suspended until May 1, 2020, unless absolutely necessary and with the approval of the Chief Judge.

7. All in-person re-entry court sessions are suspended until May 1, 2020.

8. All petty offense (CVB) proceedings are suspended until May 1, 2020.

9. Consistent with recently implemented procedures, all detainees, upon arrival at a courthouse and before appearance in court, will undergo screening for fever and other symptoms of COVID-19 contamination. Such screening will be administered by and/or at the direction of the United States Marshals Service (USMS) or its agencies or designees. The presiding judge must be notified if the detainee exhibits risk factors and will have the discretion to order the detainee returned to the facility from which they came.

OTHER:

1. All mass public gatherings are suspended, including, but not limited to, group tours and visits, moot courts and mock trials, bar group meetings, seminars, and naturalization ceremonies.

2. All employees of the District Court are directed to telework through May 1, 2020, except when directed by their supervisors/judges to report to the courthouse to perform essential functions.

3. The Clerk's Office intake windows will be closed. Electronic filings may still be made through the CM/ECF system. For those without access to CM/ECF, documents may be submitted by mail, or in the event of an emergency, may be submitted by email to: EmergencvFiline@ohnd.uscourts.gov. All emergency filings must include an email address and phone number where the filer may be reached. Filings submitted by mail and email will be processed each business day. Mail will be received and processed each business day. Clerk's Office staff will be available by telephone from 9:00 a.m. to 4:00 p.m. each business day as follows:

Akron: (330) 252-6020 Cleveland: (216) 357-7011 Toledo: (419) 213-5521 Youngstown: (330) 884-7420

Payments by attorneys using the CM/ECF system will be processed via credit card utilizing Pay.gov. Payments by check or money order will be accepted by mail and will be processed when received.

Cash payments will not be accepted during this period. Any *pro se* litigant filing a case via email who cannot secure a check or money order should submit his or her filing by mail, and the Clerk's Office will send a notice directing payment be submitted after courthouses reopen.

4. All Pretrial Services & Probation Offices will operate on skeleton crew. For information or assistance, a duty officer will be available at 216-357-7300.

The Court will vacate or amend this Amended General Order no later than May 1, 2020.

IT IS SO ORDERED.

FOR THE COURT _____ Patricia A. Gaughan Chief Judge

[1] The Court is taking judicial notice of the contents of this adversary proceeding docket and case records; they are public records. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1171-72 (10th Cir. 1979) (stating that judicial notice is particularly applicable to the court's own records of litigation closely related to the case before it); *United States v. Brugnara*, 856 F.3d 1198, 1209 (9th Cir. 2017) (stating that district court may properly take judicial notice of its own records).

The Court is also taking judicial notice of publicly available notices, orders and information about the status of operations of this Court, the United States District Court for the Northern District of Ohio, the Ohio Supreme Court, and the State of Ohio available on public government websites. This information is both generally known within this Court's jurisdiction, and is accurately and readily available on public

government websites. Fed. R. Evid. 201(b)(1) and (2). Those sources cannot reasonably be questioned as to their accuracy. Plaintiffs themselves raise this information in the Motion.

[2] Until 2009, when the Bankruptcy Rules were amended to set time periods in multiples of 7 days, the deadline in Rule 8002(a) for filing a notice of appeal was 10 days after entry of judgment.

[3] The provision in the Federal Rules of Bankruptcy Procedure governing extensions of time to appeal, including after expiration of the deadline, was previously found at Rule 8002(c)(2). That provision was amended and renumbered as part of the 2014 rule amendments, and is now in Rule 8002(d)(1).

[4] The appellant in *Community Financial Services Bank v. Edwards (In re Edwards),* Case No. 17-8028, 2018 WL 2717237 (B.A.P. 6th Cir. June 5, 2018), *aff'd* 748 Fed. App'x 695 (6th Cir. June 15, 2019), raised the issue whether "the reason for the delay" and "whether it was within the reasonable control of the movant" are one factor or two separate factors, and thus whether there are really four *Pioneer* factors or five *Pioneer* factors. Like this one, the *Edwards* case involved a missed deadline for filing a notice of appeal and excusable neglect under Bankruptcy Rule 8002(d). Affirming the bankruptcy court's denial of a motion for extension of time because there was no excusable neglect shown, the appellate court decided the trial court's factor enumeration does not much matter as long as both aspects of the reason advanced for missing the appeal deadline are considered.

[5] The Court is well-familiar with these sad and difficult circumstances. The attorney in question was a debtor in this Court in which a motion by the United States Trustee's office to dismiss his Chapter 7 case had most recently been set for evidentiary hearing to occur on April 1, 2020. *In re Wagoner,* Case No. 18-33992, United States Bankruptcy Court for the Northern District of Ohio, Western Division, [Doc. # 44]. As with all other then-pending evidentiary matters in this Court the hearing date was *sua sponte* vacated on March 18, 2020, and continued to further order of the court. *Id.* [Doc. # 46]. As shown by the suggestion of death filed on March 25, 2020, well-before the Court's March 30 judgment in this case, the debtor in that case died on March 18, 2020. *Id.* [Doc. # 49]. The motion was immediately withdrawn, *id.* [Doc. # 48], the Court entered the late debtor's discharge and, on March 31, 2020, his case was closed, [Doc. # 52]. While Plaintiffs raise these general circumstances, they also exemplify the way this court and practitioners therein continued to do business largely unabated, except for the conduct of trials and evidentiary hearings, throughout this time period and even around the sad death of this debtor.

[6] Notice of Electronic Filing. Upon electronic filing of a document, the ECF system will generate a Notice of Electronic Filing, which will be automatically served electronically by the system on all parties who appear on the current Electronic Mail Notice List within that case. This notification will advise the parties of the filing of the document, but the parties will be required to access the ECF system to read the actual document that was filed. Electronic Case Filing (ECF) Administrative Procedures Manual, § II.D.2.

[7] https://www.ohnb.uscourts.gov/file-list/administrative-procedures-manual.

[8] https://www.ohnb.uscourts.gov/news-and-announcements/

[9] https://www.ohnb.uscourts.gov/general-orders/temporary-modification-requirement-obtain-original-signatures-persons-electronic

[10] https://www.ohnb.uscourts.gov/general-orders/temporary-filing-procedures

[11] https://www.ohnb.uscourts.gov/general-orders/temporary-modification-requirement-obtain-original-signatures-persons-electronic-0

[12] https://www.ohnb.uscourts.gov/general-orders/temporary-filing-procedures-0

[13] https://www.ohnb.uscourts.gov/news-and-announcements/

[14] https://www.ohnb.uscourts.gov/judges-info/general-orders

[15] https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-1166.pdf

[16] https://www.supremecourtohio.gov/tolling/default.asp

[17] https://www.supremecourtohio.gov/coronavirus/resources/tollingAnalysis040220.pdf

[18] https://coronavirus.ohio.gov/static/publicorders/Executive-Order-2020-01D.pdf

[19] https://coronavirus.ohio.gov/status/DirectorsOrderStayAtHome.pdf

[20] https://coronavirus.ohio.gov/status/publicorders/Directors-Stay-At-Home-Order-Amended-04-02-20.pdf